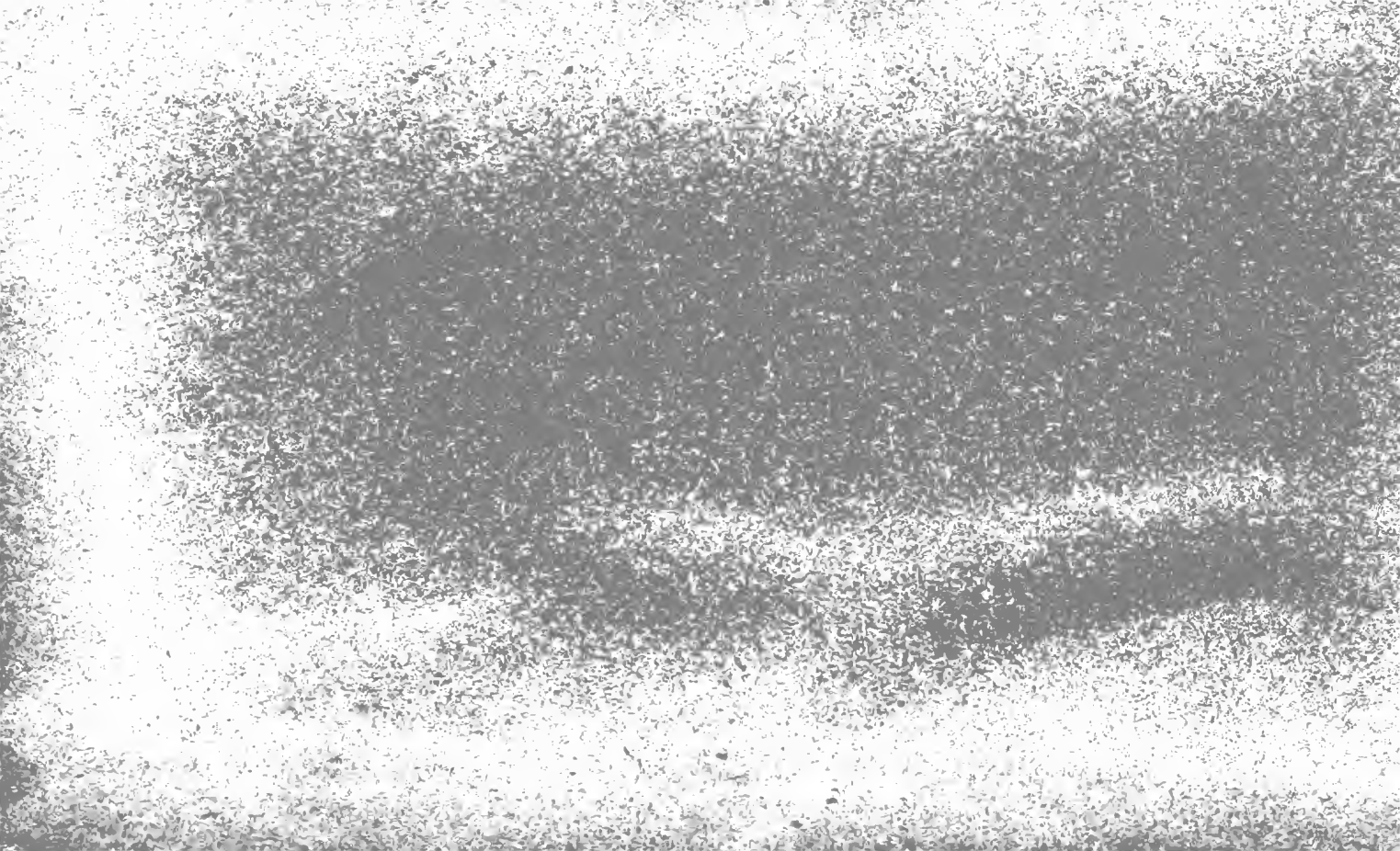

THE LAW

RELATING TO ACTIONS FOR

MALICIOUS PROSECUTION.

BY

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WITH AMERICAN NOTES

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NOTE.

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PREFACE.

THIS book is intended to be, in the first place, a convenient collection of authorities upon the law of malicious prosecution; and, in the second place, a demonstration of the fact that the old doctrine, that the question of reasonable and probable cause is a question for the Court, has lost its vitality, and that the duty of determining that question has, by an ingenious but rather cumbersome process, been transferred from the Court to the jury.

I see no reason—at least no reason in the nature of the subject—why the Legislature should not recognize and indorse the change which, as I have explained in the text, I hold to have been finally consummated by the judgment of the House of Lords in *Abrath* v. *The North Eastern Railway Company.* I think that a convenient way of doing so would be to enact that in all future actions for malicious prosecution the plaintiff should be entitled to recover on proof that the defendant instituted the prosecution against him either without honestly believing him to be guilty, or without having a reasonable ground for believing him to be guilty; and that whether the defendant's ground for believing the plaintiff to be guilty was reasonable should be—as the judges have made it—a question of fact. In my opinion, this represents the substance of the existing law, and would relieve the judges of the fiction whereby at present they ask the jury whether the defendant took reasonable means to inform himself of the true facts of the case, and whether he honestly believed in the plaintiff's guilt, and on being told by the jury that he did or did not, hold that he had or had not reasonable cause accordingly.

I see no reason why the necessity for proving malice should be retained. It is ineffectual, because the jury are at liberty to infer it from the want of reasonable cause, and it is now the jury and not the judge who decide whether or not a want of reasonable

cause has been proved. It is almost impossible to imagine a jury finding that the defendant honestly believed his case, that he had not taken reasonable means to discover the truth, and that he had not been actuated by any "indirect motive."

It might also be convenient to settle by legislation the undecided question whether a corporation aggregate can be liable for malicious prosecution.

Chapter VII., which deals explicitly with the topic of the provinces of the Court and the jury as to reasonable cause, is equally applicable to the torts of malicious prosecution and false imprisonment, and Chapter VI. nearly so. The question what is reasonable cause for suspicion is identical in both torts, but in false imprisonment further questions arise of considerable intricacy, depending upon the rights and duties of constables, and of persons who are not constables, in the matter of arresting suspected persons.

Since the book has been in type the Standing Committee on Law of the House of Commons has introduced into the County Courts Consolidation Bill a clause giving to County Courts jurisdiction to entertain actions for malicious prosecution. Should this provision become part of the law, I hope that it may increase the number of those to whom this book may be useful.

H. S.

TEMPLE,
May, 1888.

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MALICIOUS PROSECUTIONS.

CHAPTER I.

THE WRIT OF CONSPIRACY.

Among the formal writs for the torts of different kinds which were recognised at the beginning of our legal history was one called the Writ of Conspiracy, which might be issued against two or more persons who had conspired together to prosecute a man criminally without lawful cause.

The form of this writ is given in Fitzherbert, and is as follows:

(a) "The king to the sheriff, &c. If A. shall make you secure, &c., then put, &c., B. and C. that they be before us, &c., to show wherefore, having conspired together at N., they falsely and maliciously procured the aforesaid A. to be indicted of stealing, taking and leading away a certain beast at N., and him to be taken upon that occasion, and to be detained in our prison of Warwick, until in our Court, before our beloved and faithful R. and S., our justices assigned to deliver our gaol of Warwick, according to the law and custom of *our realm, he [*2] was acquitted, to the great damage of him the said A., and contrary to the form of the ordinance in such case provided. And have there the names of the pledges and this writ. Witness, &c."

This was the form of writ in use where the prosecution complained of as malicious had been by way of indictment.

There was also another form for use where an appeal of felony had been brought against the plaintiff by the defendants, and had

(a) F. N. B. 114 D.

resulted in a nonsuit. In this case the defendants were called upon "to show wherefore, having before had conspiracy between them at N., they falsely and maliciously procured the aforesaid A. to be appealed of the death of D., lately slain at E., and him the said A. to be taken upon that occasion and to be detained in our prison of L. until in our Court before us the same A., &c., by the consideration of our Court departed quitted thereof, &c."

The statute referred to in these writs was the statute of Edward III., called "De Conspiratoribus," which begins with the following definition:—

(*b*) "Conspirators be they that do confeder or bind themselves by oath, covenant or other alliance that every of them shall aid and bear the other falsely and maliciously to indite or cause to indite, or falsely move or maintain pleas," and goes on to deal with the kindred wrong of maintenance.

(*c*) Since one person one cannot be guilty of con-
[*3] *spiracy, this form of action lay only when more persons than one were concerned in the false indictment; and when the wrong was committed by only one person there was an action on the case "in the nature of an action of conspiracy" against him. The distinction between the two kinds of action is exhaustively treated in the judgment of Lord Chief Justice Holt in the case of *Savill* v. *Roberts*, 1 Ld. Raym. 374 (1678), which may be considered the foundation of the modern action for malicious prosecution.[1]

"Where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy; where one he shall have case." He observed that, in strictness, conspiracy lay only for falsely indicting of treason or felony where life was in danger, and he pointed out that in conspiracy the jury could not convict less than two defendants; whereas in case, if there were more defendants than one, a verdict could be given against one only (*d*).

Holt declared the conspiracy itself to be the "ground" of the action of conspiracy, while the ground of the action in case was

(*b*) 33 Edw. 1, st. 2.
(*c*) 22 As. 77; Cox *v.* Wirrall, Cro. Jac. 193.
(*d*) The same thing was decided in Price *v.* Crofts, Sir T. Raym. 180.
[1] Where several conspire successfully to procure the plaintiff to be convicted of crime by false testimony, the gist of the action is the alleged tort and not the alleged conspiracy: Garing *v.* Fraser, 76 Me. 37 (1884), Virgin, J. See Wright on Crim. Con.

damages, which might be damage to fame, as where the accusation was scandalous; damage to the person, "such as *imprisonamentum et arrestatio corporis;*" or damage to property, such as the necessary expenses incurred by the wrongfully prosecuted man in his defence.

Holt also gives the following account of how maliciously indicting came to be actionable at all. The * common [* 4] law, in order to hinder frivolous and vexatious suits, made every plaintiff find pledges, who was amerced if he failed to make out his claim. When this method became obsolete, successful defendants were enabled by statute to recover the costs to which they had been put; but for groundless criminal charges there had never been any remedy except by action.

Besides the essential differences between the two actions, others arose in consequence of the form of the writ. For example, in conspiracy, the writ said that the plaintiff had been acquitted, and therefore the action of conspiracy did not lie if the grand jury had ignored the bill. As to this, see *Smith* v. *Cranshaw*, Sir W. Jones, 93 (1625) (*e*). The action of conspiracy, therefore, fell into disuse, being superseded by the action on the case for malicious indictment or malicious prosecution, as the case might be, which was in use as long as formal actions lasted and is now represented by the fact that malicious prosecution is a tort for which an action lies in the High Court. County Courts have no jurisdiction to entertain it (9 & 10 Vict. c. 95, s. 58).

(*e*) *Vide post*, p. 11.

[* 5] * CHAPTER II.

WHAT IS A PROSECUTION.

In order to be liable to an action for malicious prosecution a defendant must have prosecuted the plaintiff, and it therefore becomes necessary to determine what constitutes a prosecution.[1]

The only definition which, so far as I know, has been explicitly suggested, is that given by Mr. Justice Lopes in *Danby* v. *Beardsley*, 43 L. T. 603 (1881) :—" . . . this might be a definition of a prosecutor—a man actively instrumental in putting the criminal law in force." (This, however, requires to be qualified by the observation, that not merely the ministerial but the judicial functions of the criminal law must be put in motion, that is, some judicial officer must be made to act in his judicial capacity (*a*). It is not enough to say something which puts it into the head of somebody else to become so instrumental. In the case in which

(*a*) *Vide post*, Chap. XIV., "The Distinction between Malicious Prosecution and False Imprisonment," p. 120.

[1] The distinction as to the different grounds of the action is clearly stated by Mr. Justice O'Neall in Frierson *v.* Hewitt, 2 Hill (S. C.), 499; "the indictment must charge a crime and then the action is sustainable *per se* on showing a want of probable cause. There is another class of cases, which are popularly called actions for malicious prosecution, but they are misnamed, they are action on the case in which a *scienter* and a *per quod* must be laid and proved. I allude, first, to actions for false and malicious prosecutions for a misdemeanor involving no moral turpitude; secondly, to an abuse of judicial process by procuring a man to be indicted when it is a mere trespass; third, malicious search warrants. In all these cases it will be perceived that they cannot be govened by the ordinary rules applicable to actions for malicious prosecutions.

"The express malice necessary to sustain the action ought to be laid and proved, and this is what I understand by *scienter*. In the action for malicious prosecution for a misdemeanor, it must be proved that the party knowing defendant's innocence, of mere malice preferred the charge; so, in the second class, it will not do to say that you indicted me, as for a trespass, but when to this statement, we superadd the facts that defendant knowing the trespass was no crime, yet procured the defendant to be indicted as for a crime, malice is clearly made out; actual injury must be stated and proved, and this constitutes the *per quod*."

See Fuller *v.* Cook, 3 Leonard, 100; Heyward *v.* Cuthbert, 4 M'Cord, 354; Candler *v.* Petit, 2 Hall, 315; M'Neely *v.* Driskill, 2 Blackford, 259; Bennett *v.* Black, 1 Stewart, 495; Leidig *v.* Rawson, 1 Seammon, 273; Randall *v.* Henry, 5 Stew. & Porter, 367; Miller *v.* Brown, 3 Mo. 127.

this suggestion was made it was proved that the plaintiff, who was the defendant's servant, lent a fellow-servant two pairs of horse-clipping machines, and took them away again when the other had done with them. The defendant had seen them lying about, and supposed they where his, * and, missing [* 6] them, he said to a policeman, "I have had stolen from me two pairs of clippers, and they were last seen in possession of Danby." The policeman, without further instructions, searched Danby's house, found the clippers, arrested Danby, and charged him with felony. The defendant was called as a witness, and gave evidence for the prosecution, both before the justices and at the trial which ensued. It was held that this did not amount to a prosecution by the defendant.

The counsel for the plaintiff having argued that the defendant "set the stone rolling," Mr. Justice Lindley replied "that the stone set rolling was a stone of suspicion only." A similar case, though not so strong, is *Harris* v. *Warre*, 4 C. P. D. 125; 48 L. J. Q. B. D. 310 (1879). In this case the point decided was, that it was not prosecuting to write a letter to a superintendent of police stating that the plaintiff had committed a murder, in consequence of which the police attempted, but in vain, to arrest the plaintiff.

It is a prosecution to swear an information, in consequence of which a warrant is issued for the plaintiff's arrest, if the information contains a statement that the informer believes the plaintiff to have committed an offence, but not otherwise.

In *Davis* v. *Noak*, 1 Star. N. P. C. 377 (1816), a declaration alleging that the defendant "charged" the plaintiff with felony, the evidence being that the defendant asserted in the information upon which the warrant was granted, that he "suspected and believed, and had good reason to suspect and believe," that the * plaintiff had committed larceny, was held to be [* 7] good after a verdict for the plaintiff. The judgment is that of Lord Ellenborough, C. J., and Abbott and Holroyd, JJ., Bayley, J., *diss.*

But in *Cohen* v. *Morgan*, 6 D. & R. 8 (1825), where nothing more was proved than that the defendant went before a justice, and made a statement from which the justice's clerk drew the information, and that upon the plaintiff appearing, and being examined, the charge was dismissed, the plaintiff was nonsuited.

In the case of *Leigh* v. *Webb*, 3 Esp. 164 (1800), the defendant, having, by means of a search-warrant, discovered some casks belonging to him in the house of someone else, swore an information stating this fact, but not making any direct charge against the plaintiff, or saying anything which amounted to a charge. The magistrate thereupon issued a warrant, and in an action for malicious prosecution, Lord Eldon nonsuited, saying that the defendant was not responsible if the magistrate erroneously thought that the facts sworn to amounted to a charge of felony. The case of *Wyatt* v. *White*, 5 H. & N. 371; and 29 L. J. Ex. 193 (1860), though nominally decided upon the question whether the defendant had reasonable and probable cause for laying the information, seems to me really to have been decided in the defendant's favour on the ground that nothing done by him amounted to a prosecution. Baron Channell said, in giving judgment: "This search-warrant does not direct an arrest on a charge of felony, but only to bring up the party found in possession of the goods to be charged if necessary." This case was [* 8] decided in * 1860; but in 1822 it had been decided, in the case of *Elsee* v. *Smith*, 1 D. & R. 28 (1822), that an action will lie for maliciously procuring a search-warrant to be issued, and the plaintiff's house to be searched. In this case the information stated that the informer suspected the goods to have been stolen, and the Court of King's Bench held that such an information, falsely and maliciously sworn, would support the action.

It appears that a charge orally made before a magistrate may be a sufficient prosecution to found an action upon, though there is no information, summons, or warrant. This was expressly laid down by Bosanquet, J., at *nisi prius*, in *Clarke* v. *Postan*, 6 C. & P. 423 (1834), where it was alleged that the defendant, after preferring a charge of assault, which the magistrate dismissed, said that he had also "a charge of felony for abstracting" certain goods, and the magistrate dismissed that charge also. However, the jury, after the direction that this might amount to a malicious prosecution, found that the second charge was not in fact made. The same theory seems to have been established in a case of much higher authority, *Dawson* v. *Vansandeau*, 11 W. R. 516 (1863). In this case both parties were attorneys, and when the prosecution complained of occurred the defendant was prosecuting, and the plaintiff defending, a man named Poole on a charge of

fraudulent bankruptcy before an alderman of the City of London. One of the plaintiff's witnesses admitted, in cross-examination, that he had, by the plaintiff's direction, signed a false statement prepared by the plaintiff, which the plaintiff had
* produced in evidence at the examination. This admis- [*9]
sion having been made, the defendant there and then gave the plaintiff into custody, and on his being searched, a letter from Poole was found upon him, to some extent corroborating the witness's story. The defendant then charged him with conspiracy to defraud, and he was remanded by the alderman. The Court of Queen's Bench, in overruling the decision of Blackburn, J., at the trial, that there was no evidence of reasonable cause, held that the corroborative evidence was discovered "before the criminal charge was perferred against him with a view to prosecution," so that here the prosecution consisted in the formal, but apparently oral, charge made after the plaintiff was in custody.

If the defendant, being the prosecutor, has taken any active part in the prosecution at any stage subsequent to its institution, but for any reason is not liable for the institution of it (as when he was bound over to prosecute by mistake, or otherwise than by reason of his own malice), he is nevertheless liable for the prosecution. Thus, if a prosecutor under such circumstances gives evidence, instructs counsel, or otherwise carries on the prosecution, there is a sufficient prosecution by him for the purposes of the action. (*Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; and 30 L. J. C. P. 257 (1861).)

Lord Denman, sitting at *nisi prius*, directed the jury, in *Clements* v. *Ohrly*, 2 C. & K. 686 (1847), that if the defendant had held himself out as maker of the charge against the plaintiff he was liable to the action. The evidence was, that the defend-
ant accompanied a clerk of * Messrs. Fuller, who procured [*10]
a warrant charging the plaintiff with forging the defendant's name to a bill, "with intent to defraud Richard Fuller and another," and that the defendant gave evidence on the hearing of the summons that he believed part of the bill to be in the plaintiff's handwriting, and that during the hearing the counsel for the prosecution "answered appeals" made to him by Mr. Edwin James "as counsel for Mr. Ohrly." There was also evidence that Messrs. Fuller directed the prosecution, took counsel's opinion, and instructed counsel, and told the defendant that he should be only a

witness, and were defending the action against him in his name. Under these circumstances the jury found for the plaintiff, but it is of course possible they were influenced by the circumstance that Messrs. Fuller, who professed to have been the prosecutors, were also the substantial defendants.

Preferring a bill before the grand jury is a sufficient prosecution to support the action, whether the grand jurors find a true bill or not.

This is the natural consequence of the fact that the wrong which gave rise to the original actions of conspiracy, and of "case in the nature of conspiracy," was the conspiracy or malicious intention "to indict," which indicting consists in preferring a bill (*b*). It was decided at the beginning of the 17th century, by the

[* 11] * unanimous judgment of the Exchequer Chamber, in the case of *Payn* v. *Porter*, Cro. Jac. 490 (1619), that the grand jury having ignored the bill did not take away the right of action. A few year's later the King's Bench held the same thing in *Smith* v. *Cranshaw*, Sir W. Jones, 93, and Palm. 315 (1625), which is one of the cases dealing with the distinction between the action of conspiracy proper, and the action on the case which is the modern action for malicious prosecution. The action was "for conspiring to accuse him *falso et malitiose*, and accusing him *falso et malitiose*." The judges "resolve que si un home ou plusors preferre un Bill de indictment de Felony *falso et malitiose* vers un auter home, & le Jury done *ignoramus* sur le Bill que en ceo case le partie poet aver Action sur le case." The judgment goes on to point out that conspiracy would not lie, because the formal writ in that case stated that the plaintiff had been "indicte & acquitte," and "le brief de conspiracy ayant un precise forme ne poet estre extende ultra le forme."

Where the bill was found by the grand jury, but the indictment was bad, so that theoretically the plaintiff could not have been convicted upon it, the action lies notwithstanding, if the prosecution was malicious and without reasonable cause.

This was first decided in *Taylor's Case*, Palm. 44 (1620), in which the successful counsel "argue fortement" that "neque

(*b*) This case was decided on a writ of error, the defendant's assignment of error being, "that this exhibiting a bill of indictment is no cause of action." The Court held that it was, and uttered the unguarded *obiter dictum* that, in that particular case, the defendant having justified and had a verdict against him, "it is good reason that the action should lie."

est l'enditement le cause del action; mes les scandalous parols queux pojent lui traher in suspition de perjurie," of which crime the plaintiff had been accused. The same point was decided about a * hundred years later, along with many [* 12] others in the leading case of *Jones* v. *Gwynn*, 10 Mod. 148 & Gilb. K. B. 185 (1713), which was followed in *Chambers* v. *Robinson*, 2 Str. 691 (1732).

In *Jones* v. *Gwynn* the plaintiff sued the defendant for falsely and maliciously indicting him for exercising the calling of a badger without being licensed. The indictment was held to be bad—it does not appear why—and it was argued that therefore no action for malicious indictment lay. Parker, C. J., in delivering judgment, disposed of the point in the most conclusive manner. He pointed out that the cause of action was the trouble and expense to the plaintiff, which were equally incurred whether the indictment was good or bad. The amount of expense incurred was not material. If the badness of the indictment were an answer to the subsequent action, it would make it safe to indict maliciously as long as you made a slip in drawing the indictment. The action was one on the case for malicious indictment; but that the badness of the indictment is immaterial must *à fortiori* be true of an action for malicious prosecution.

On the other hand, a prosecution for one offence is not, it would seem, justified by the fact that there might have been reasonable cause for a prosecution for some other offence. In *Wicks* v. *Fentham*, 4 T. R. 427 (1791), the plaintiff proved that the defendant had indicted him for having permitted an escape as a constable, upon which indictment he had been acquitted, because he was not a constable but a headborough. Lord Kenyon thereupon nonsuited, on the ground that * the [* 13] plaintiff had failed to show that there was no ground for the prosecution on the merits. The Court overruled the nonsuit, and ordered a new trial, holding, on the authority of the cases cited, that "a bad indictment served all the purposes of malice."

The action lies, whether the Court in which the prosecution took place was competent to take cognizance of it or not.[1]

[1] If the prosecution be before a Court having no jurisdiction, the party may bring either trespass or case: Morris *v.* Scott, 2 Wend. 281; Hays *v.* Younglove, 7 B. Mon. 545; see also Turpin *v.* Remy, 3 Blackford, 211; Bodwell *v.* Osgood, 3 Pick. 379; Allen *v.* Greenlee, 2 Devereux, 370.

In *Attwood* v. *Monger*, Sty. 378 (1653), the action was for a false presentment before the Conservators of the Thames charging the plaintiff with having suffered eight loads of earth to fall into the Thames. After verdict for the plaintiff, the defendant moved, in arrest of judgment, that it did not appear on the record that the Conservators had authority to take the presentment, and that if they had not, the proceeding was one *coram non judice*, by which the plaintiff could not be prejudiced. Roll, C. J., said: "It is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation."

It seems that there is a malicious prosecution sufficient to support an action if the indictment contains substantially more charges than one, any one of which is malicious and without reasonable and probable cause.[2]

In *Read* v. *Taylor*, 4 Taunt. 616 (1812), the defendant had indicted the plaintiff for perjury on twelve assignments, and the plaintiff had been acquitted. The defendant succeeded in showing reasonable and probable cause for three of the assignments, but not for the other nine. After a verdict for the plaintiff, the defendant moved for a rule *nisi* for a new trial. Mans-
[* 14] field, C. J., * and Gibbs, J., refused a rule, saying that the whole indictment was set out in the declaration, and that it was enough for the plaintiff to show that any part of it was malicious and without reasonable and probable cause. Gibbs, J., said: "There is no probable cause for some of the charges in the indictment; therefore this indictment is preferred without probable cause."

Some doubt was thrown upon the authority of this case in the subsequent case of *Delisser* v. *Towne*, 1 Q. B. 333 (1841). Mr. (afterwards Chief Baron) Kelley stated in argument that the report of *Read* v. *Taylor* was probably incorrect; that the judgments as reported did not answer the points taken at the bar, and that the decision was inconsistent with the judgments of Lords Mansfield and Loughborough in *Johnstone* v. *Sutton* (*c*), in which last objection Lord Denman concurred. *Delisser* v. *Towne*, was also a case in which the plaintiff had been indicted for perjury on many assignments. One of the assignments was for swearing

(*c*) 1 T. R. at pp. 507, 508, and 547, and *vide post*, p. 29.

[2] An action of malicious prosecution will lie, after a criminal prosecution begun, though no indictment has been preferred: Schock *v.* M'Chesney, 4 Yeates (Pa.), 507 (1808); Stewart *v.* Thompson, 51 Pa. St. 158 (1865).

that he did not know whether or not he had paid a dividend under his bankruptcy. The rest were for statements about making a will, quite distinct from the statement about the dividend. The plaintiff proved that there was no reasonable and probable cause for the prosecution as far as concerned the one alleged perjury about the bankruptcy, and gave no evidence as to the other matters. He recovered 800*l.* damages, which sum was reduced by the advice of the Court to 500*l.* The matter subsequently came before the Court as an appeal * from the Master's decision as to costs. It was held [* 15] that the plaintiff was not entitled to the costs, which had been allowed by the Master, of the witnesses who would have proved the part of his case on which he gave no evidence. The Court, however, refused to give the defendant his costs as to the nine assignments which were not gone into; for they said that preferring the indictment, which was one charge, constituted one cause of action, and that "the plea of not guilty denies that one cause of action, and amounts to an assertion that the defendant had probable cause for the whole of the indictment. That is an entire issue; and, if there was no probable cause for any part of the charge (*d*), the plaintiff was entitled to a verdict." In *Boaler* v. *Holder*, 51 J. P. 277; 3 Times Law Rep. 546 (1887), the plaintiff was indicted under 6 & 7 Vict. c. 96, s. 4, for publishing a libel knowing it to be false, and was found not guilty of publishing a libel knowing it to be false, but guilty of publishing a libel, and was imprisoned. He sued for malicious prosecution, and the judge, on proof of the conviction, dismissed his action, and gave judgment for the defendant. The Divisional Court (Wills and Day, JJ.) made an order absolute for a new trial, on the ground that the conviction was bad, and amounted in law to an acquittal. Wills, J., added, "To put a man on his trial for a much graver offence than you have any chance of convicting him of, is a legal wrong. The plaintiff has made out that he had * been put on his trial wantonly, and that there was [* 16] an absence of reasonable and probable cause."

A prosecutor is not the less responsible for the prosecution because he was bound over to prosecute by the committing justices, if such binding over is the result of malicious conduct on

(*d*) This obviously means "if there was any part of the charge for which there was no probable cause."

his part, whether the prosecution by him is prior or subsequent to the binding over. *Dubois* v. *Keats*, 11 Ad. & E. 329 (1840); *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 505; and 30 L. J. C. P. 257 (1861).

The principal case on this subject is *Fitzjohn* v. *Mackinder*. Mr. Justice Williams, who tried the case, nonsuited the plaintiff, but though he had made up his mind to do so, let the case go to the jury, presumably that the verdict might save a new trial in the event of his nonsuit being subsequently overruled. The Court of Common Pleas, Willes, J., dissenting, affirmed the nonsuit, and the plaintiff appealed to the Court of Exchequer Chamber. In that Court the judges, for the purpose of determining whether the case was a proper one to be left to the jury, assumed the findings of the jury to be correct, and they were as follows:—The defendant sued the plaintiff in a county court, and the plaintiff relied on a set-off in answer to which the defendant produced a settlement of accounts, purporting to be signed by the plaintiff, and swore falsely that the plaintiff had signed it. The plaintiff swore he had not signed; but the judge, not believing the plaintiff, of his own accord made an order under 14 & 15 Vict. c. 100, that he should be tried for perjury, [* 17] and bound * the defendant over to prosecute. The defendant prosecuted accordingly, and gave false evidence before the grand and petit juries, of which the former found a true bill and the latter acquitted the plaintiff. In the Exchequer Chamber, Blackburn and Wightman, JJ., thought that the nonsuit was right, principally on the ground that the prosecution was a prosecution not by the defendant, but by the county court judge. Cockburn, C. J., Bramwell and Channell, BB. (*e*), on the other hand, thought the nonsuit wrong, on the ground that the defendant was not bound by his recognizances to give false evidence, or indeed to continue the prosecution after preferring the bill before the grand jury. Baron Bramwell thought that the binding over was a goood answer as far as preferring the indictment went, and that no action would have lain if the grand jury had ignored the bill; but the Lord Chief Justice and Baron Channel dissented from this view, because the defendant might, if he had liked, have forfeited his recognizances. If Baron

(*e*) The report in C. B. N. S. says that seven judges heard the case argued. I do not know why the other two gave no judgment.

Bramwell's view of the case was the right one, the fact that the evidence given by the defendant in prosecuting the plaintiff was false was essential to the decision of the question. In the other view it was material whether the substantially identical evidence which he gave before the county court judge was false. Yet, as one reads the case now, there seems to be no particular reason, except the verdict, for supposing that it was false.

*In *Eagar* v. *Dyott*, 5 C. & P. 5 (1831), Harman, [* 18] who was a co-defendant with Dyott, had been bound over to prosecute and give evidence by mistake, without his own consent, and did not employ the attorney for the prosecution, upon proof of which Lord Tenderden "directed an acquittal."

Dubois v. *Keats*, 11 Ad. & E. 329 (1840), was chiefly relied upon for the plaintiff in *Fitzjohn* v. *Mackinder*. In that case Coleridge, J , had told the jury that if the defendant being bound over to prosecute was the result of a charge made maliciously before the magistrate, such binding over was no defence to the action.[1] The Court of Queen's Bench refused a rule for a new trial asked for on the ground that this was a misdirection; and, inasmuch as it only amounted to saying that a malicious prosecution is actionable before the stage of committing for trial or binding over to prosecute is reached, there can be no doubt that they were right, although the bearing of the decision upon the question raised in *Fitzjohn* v. *Mackinder* is not so clear.

It seems that an action will lie for a malicious prosecution in an Ecclesiastical Court. *Fisher* v. *Bristow*, 1 Dougl. 215 (1779), was an action for maliciously presenting the plaintiff for incest in the Ecclesiastical Court of the Archdeaconry of Huntingdon. A demurrer to the declaration on another ground (*f*) was successful, but no objection was raised as to the nature of the prosecution.

(*f*) *Vide post*, p. 99.

[1] It is no defence that an affidavit was insufficient in law to authorize an arrest: Stocking *v.* Howard, 73 Mo. 25 (1880); *contra*, Hanes *v.* Kohler, 25 Kans. 640 (1881), Valentine, J.

[*19] # * CHAPTER III.

WRONGS RESEMBLING MALICIOUS PROSECUTION.

It has been held, or suggested, that actions may lie for various torts more or less closely analogous to malicious prosecution. The chief of these are:—

Malicious arrest [this is nearly obsolete]:
Bringing or conspiring to bring a civil action vexatiously:
Maliciously taking proceedings in bankruptcy:
Maliciously presenting a petition for the winding-up of a company:
Maliciously obtaining a search warrant for goods:
Maliciously obtaining a search warrant under the Criminal Law Amendment Act, 1885:
Maliciously exhibiting Articles of the Peace.

Malicious arrest.—Owing to the abolition of arrest on mesne process, this subject has lost its importance. But there never was any doubt that maliciously and without reasonable and probable cause to procure the arrest of anyone was actionable.[1] *Scheibel* v. *Fairbairn*, 1 B. & P. 388 (1799); *Gibson* v. *Chaters*, 2 B. & P. 129 (1800); *Page* v. *Wiple*, 3 East, 314 (1803); *Jennings* v. *Florence*, 2 C. B. N. S. 467 (1857); *Gilding* v. *Eyre*, 10 C. B. & N. S. 592 (1862). If the arrest was for a larger sum than was due it might be malicious as to the excess,[2] though justifiable as to the debt. Where the defendant had obtained judg-
[*20] ment against the plaintiff for 115*l.* 2*s.*, * and also in a separate action for the same debt, against C. for 100*l.*

[1] The remedy for causing an arrest by maliciously bringing a suit upon false charges or maliciously making a false affidavit is an action on the case for malicious prosecution: Everett *v.* Henderson, 146 Mass. 93 (1888), Knowlton, J. In Wheeler *v.* Nesbitt, 24 How. (U. S.), 545 (1860); Clifford, J. ruled that as the magistrate who issued the warrant was one of the parties sued and there was probable cause for his arrest, he could be detained a reasonable time, as he neglected satisfactory security.

[2] Demanding excessive bail, when the plaintiff has a good cause of action or holding to bail when there is no cause of action, if done vexatiously, entitles the party injured to an action for malicious prosecution: Ray *v.* Law, 1 Peters C. C. 207 (1816), Washington, J.

10*s.* and the judgment debt of 100*l.* 10*s.* had been satisfied by C., and the defendant arrested the plaintiff on a *ca. sa.* for the whole sum of 115*l.* 2*s.*, and imprisoned him for four weeeks till he obtained a judge's order for his release, the declaration was held good on demurrer by Lord Campbell, though it would not have been good if malice and want of reasonable and probable cause had not been averred *Churchill* v. *Siggers*, 3 E. & B. 929 (1854).

It would seem, on the analogy of these cases, that an action would lie for maliciously and unreasonably causing the plaintiff to be detained under a writ of *ne exeat regno.* See *Bank of British North America* v. *Strong*, 1 App. Cas. 307 (1876).

Bringing or conspiring to bring a civil action maliciously.—It is doubtful whether an action lies for suing or—apart from the law of maintenance—for conspiring to sue the plaintiff vexatiously at Nisi Prius. In *Cotterell* v. *Jones*, 11 C. B. 713 (1851), a declaration to this effect was held bad on demurrer, because it did not show legal damage. Williams, J., said, in the course of his judgment: "For improperly putting the law in motion in the name of a third person, . . . if there be malice and want of reasonable and probable cause, no doubt the action will lie, provided there be also a legal damage." The other judges expressed no opinion on the point.

A somewhat similar case is mentioned in the Year * Book [* 21] (3 As. 13, 1275): "Un bill de Conspiracie fuit maintenu en Bank le Roy p agard pur celuy q fuit endire [? endite] de comon trespas, and acquit, non obstant que ceo ne fuit mie felonie." But in this case the proceeding is described as an indictment; and there is no doubt that trespass was at that date in some degree of a criminal character (*a*).

Fitzherbert also states (F. N. B. 116) that "the action [of conspiracy] lies for bringing groundless actions at Nisi Prius."

In *Attwood* v. *Monger*, Style, 378 (1653), Roll, C. J., said: "I hold that an action upon the case will lye for maliciously bringing an action against one where he had no cause; and if such actions were used to be brought it would deter men from such malicious courses as are often put in practice." It is, however, not clear that he was speaking of civil actions.[1]

(*a*) See note by Mr. F. W. Maitland in Pollock's Law of Torts.

[1] Notwithstanding the decided stand of the English courts, the law of this country is well settled that the action may be founded on a civil suit: Pang-

There are two precedents for actions for maliciously and unreasonably suing *in rem* and arresting ships. *Castrique* v. *Behrens*, 3 E. & E. 720 (1861), was an action for maliciously, and without reasonable and probable cause, suing the plaintiff in France in an action *in rem*, and causing his ship to be condemned there. It was argued on demurrer in the Court of Queen's Bench, and decided in the defendant's favour, on the ground that the declaration did not allege the proceeding to have terminated favourably to the plaintiff (*b*). In [* 22] *Redway* v. *McAndrew*, L. R. 9 Q. B. 74 (1873), * a declaration for maliciously and without reasonable and probable cause procuring the plaintiff's ship to be arrested and detained in England was held good on demurrer (by Blackburn and Archibald, JJ.; Quain, J., *diss.*); but, as in *Castrique* v. *Behrens*, the only point relied upon by the defendant was, that the declaration did not sufficiently show a termination of the proceedings favourable to the plaintiff. The question, whether or not the action lay, does not seem to have been raised in argument, and was not decided in the judgment in either of these cases.

The view that no action lies at present for bringing, or conspiring to bring, a civil action—at any rate *in personam*—maliciously and without reasonable cause, is strongly supported by the observations of Bowen, L. J., in *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674, at p. 690; and 52 L. J. Q. B. D. 488 (1883).

Maliciously taking proceedings in bankruptcy.—Actions have

(*b*) *Vide post*, p. 100.

burn *v.* Bull. 1 Wend. 345 (1828), Woodward, J.; Whipple *v.* Fuller, 11 Conn. 582 (1832), Church, J.; Cox *v.* Taylor, 10 B. Mon. 17 (1849), Marshall, C. J.; Closson *v.* Staples, 42 Vt. 209 (1869), Wilson, J.; Marbourg *v.* Smith, 11 Kans. 554 (1873), Valentine, J.; Wood *v.* Finnell, 13 Bush. 29 (1878), Grier, J. See an able article on the subject in 21 Amer. Law Reg. 370; Butler's note to Co. Litt. 161 a.

It is further maintained that the action may be founded on a civil suit though there were no seizure of person or property or other grievance occasioned: Whipple *v.* Fuller, 11 Conn. 582; Pangburn *v.* Bull, 1 Wend. 354; Davis *v.* Gully, 2 Devx. & Batt. 360; McCardle *v.* McGinley, 86 Ind. 538, 44 Amer. Rep. note 346; Wood *v.* Finnell, 13 Bush. (Ken.) 629; Eastin *v.* Bank, 66 Cal. 123, 56 Amer. Rep. 77 (1884), Ross, J.; *contra* Ray *v.* Law, 1 Peter C. C. 207; Potts *v.* Imley, 1 Southard, 331; Algor *v.* Stillwell, 1 Halstead, 166; Eberly *v.* Rupp, 90 Pa. 259 (1879); Muldoon *v.* Rickey, 103, *Id.* 111 (1883); Wetmore *v.* Mellinger, 64 Iowa, 74, 52 Amer. Rep. 465 (1884), Beck, J.; and in such cases the plaintiff is entitled to recover the damages sustained by him: Lawrence *v.* Hagerman, 8 Amer. Rep. 674; Closson *v.* Stapels, 1 *Id.* 316.

several times been maintained for maliciously and without reasonable and probable cause instituting procedings in bankruptcy.[1]

The question appears to have been first raised in 1763, when it was argued, in *Brown* v. *Chapman*, 1 W. Bl. 427, that an action did not lie for maliciously suing out a commission of bankruptcy, because the bankruptcy statutes (5 Ann. c. 22, s. 7; 5 Geo. I. c. 24; 5 Geo. II. c. 30, s. 23) provided specific remedies. But Lord Mansfield said: "This case is too clear to hear any argument on the other side. There is no clause to * take away the jurisdiction of the common law—no [* 23] clause that a man shall not receive more damage than 200*l*," which was the limit of the statutory penalties. From which it appears that the existence of such actions must have been established before the statutes were passed.

And as in the case of an indictment, so with a petition for adjudication, that where it is malicious and actionable, it is not the less so because it is bad. In *Farly* v. *Danks*, 4 E. & B. 493 (1855), which was an action for maliciously, &c., causing the plaintiff to be adjudicated a bankrupt, it was argued that the petition, which was the act complained of, though it was mostly false and decidedly malicious, was not sufficient in form to justify the adjudication. Lord Campbell and the rest of the Queen's Bench unanimously held that "cause" in this connection did not mean legally and regularly cause, but had its natural and wider meaning.

Two cases (*Cotton* v. *James*, 1 B. & Ad. 128; *Whitworth* v. *Hall*, 2 B. & Ad. 695) were decided on other points in 1830 and 1831 respectively, in which the plaintiffs sued for the same wrong without any question being raised as to whether or not the action lay.

In *Johnson* v. *Emerson*, L. R. 6 Ex. 329 (1871), Martin, B. (at pp. 377—80), expressed a doubt whether an action lay for presenting a petition for adjudication under the Bankruptcy Act of 1869. In that case the question was whether there was evidence for the jury of malice or want of reasonable and probable cause. The Court was divided, Kelly, C. B., and Cleasby, B., holding that there was, and Martin and Bramwell, BB., * that there was not; but no doubt whether such an action [* 24] lay was expressed by anyone except Baron Martin.

[1] Where the plaintiff has reasonable cause to believe that defendant is his debtor and has committed an act of bankruptcy he is justified in proceeding against him as a bankrupt: Stewart *v.* Someborn, 8 Otto, 187.

In *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; and 52 L. J. Q. B. D. 488 (1883), however, the Master of the Rolls expressed his opinion that the doubts of Baron Martin in *Johnson* v. *Emerson* were unfounded, and that, under the Act of 1869, such an action lay. On the whole, it appears that maliciously and without reasonable cause endeavouring to make a solvent man a bankrupt is actionable by precedent, but it does not seem to be clearly ascertained what proceedings are necessary to constitute the wrong, nor do I know of any such case having been tried since the passing of the Bankruptcy Act, 1883.

Maliciously presenting a petition to wind up a company.—An action lies for maliciously and without reasonable cause presenting a petition to wind up a company. It is not necessary to prove special damage. *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; and 52 L. J. Q. B. 488 (1883). The ground of the action is the injury to the company's credit, and the action was said by the Master of the Rolls to be closely akin to that for maliciously and without reasonable cause taking proceedings in bankruptcy.

Maliciously procuring the issue of a search warrant for goods.—This, as already stated (*a*), has been repeatedly held to be actionable, and to be subject to substantially [* 25] * the same conditions as the ordinary action for malicious prosecution. *Leigh* v. *Webb*, 3 Esp. 164 (1800); *Elsee* v. *Smith*, 1 D. & R. 28 (1822); *Wyatt* v. *White*, 5 H. & N. 371; and 29 L. J. Ex. 193 (1860).

Maliciously obtaining a search warrant under 48 & 49 Vict. c. 69.—In 1886 an action was brought for maliciously and without reasonable cause laying an information before a justice and procuring him to issue a warrant under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69, s. 10), to search the plaintiff's house for the daughter of the defendant, who suspected that she was detained there for immoral purposes. The action was tried before Mr. Justice Manisty, who held that there was no reasonable cause for obtaining the warrant, and left the question of malice to the jury, who found for the plaintiff. The Divisional

(*a*) *Vide ante*, p. 8.

Court (Lord Coleridge, C. J., and Matthew, J.) held that there was no evidence of want of reasonable cause, and entered judgment for the defendant. Lord Coleridge expressed the opinion that if the magistrate who granted the warrant satisfied himself, as the Act requires him to do, that there was reasonable cause for suspecting that the girl was detained as alleged, that was a complete answer to such an action. It does not seem to have been argued that the action did not lie. *Hope* v. *Evered*, 17 Q. B. D. 338; and 55 L. J. M. C. 146 (1886).

Maliciously exhibiting articles of the peace.—An * action lies for this wrong, or for maliciously procuring [* 26] a justice of the peace to bind the plaintiff over to keep the peace. *Steward* v. *Gromett*, 7 C. B. N. S. 191 (1859). A person against whom articles of the peace are exhibited, or an application to bind him over made before a justice, cannot be heard to contradict the statements in the articles, but must be bound over if they show sufficient cause on the face of them. *R.* v. *Doherty*, 13 East, 171 (1810).

Actions have been brought for maliciously and without probable cause proceeding to outlawry, which was afterwards reversed, in respect of an unfounded claim of debt (*Drummond* v. *Pigou*, 2 B. N. C. 114 (1835)); and for maliciously issuing a commission of lunacy (*Turner* v. *Turner*, Gow, 20 (1818)).[1] In each of these cases the judge nonsuited, on the ground that the evidence showed probable cause for the proceeding; and in the former the Court of Common Pleas upheld the nonsuit, and discharged a rule for a new trial.

Prosecution, for what.—It may be laid down as a general rule, deducible from the authorities, that wherever there is a prosecution for a criminal offence an action for malicious prosecution will lie if the prosecution was malicious and without reasonable cause, whatever the alleged criminal offence may have been.

There seems at one time to have been a distinction between prosecutions for crime of a disgraceful character and prosecutions substantially amounting only to actions for penalties.

* *Low* v. *Beardmore*, Sir T. Raym. 135, 17 Car. 2, was [* 27]

[1] The action will be sustained against one instituting or instigating a proceeding *de lunatico inquirendo:* Lockenour *v.* Sides, 57 Ind. 360.

an action on the case for maliciously indicting the plaintiff for a rescue. It does not appear that judgment was given; but Twisden, J., is reported to have said, "In *Chamberlain & Prescot's case* it was resolved in this Court that the action lies for such indictment, but the judgment was afterwards reversed in the Exchequer Chamber; but it seemed a hard case if the action should not lie" (*c*). *Henley* v. *Burstall*, Sir T. Raym. 180, 21 Car. 2, was an action on the case for indicting the plaintiff for misbehaviour as a justice of the peace. It was held that the action lay, because the prosecution was for "matter of imputation and slander as well as crime." A prosecution for forcible entry was suggested as an instance of a charge of "crime without slander," for which an action for maliciously indicting would not lie. An *obiter dictum* in this case, that an action would not lie for falsely indicting of trespass, was overruled by Holt, C. J., in *Savill* v. *Roberts*, 1 Ld. Raym. 374; and 1 Salk. 13 (1678).

On the other hand, criminal prosecutions for nuisance and the like have always been recognized as sufficient to sustain actions for malicious prosecution. In the 17th century it was held that an action lay for a malicious presentment before the Conservators of the Thames, whether the Conservators had jurisdiction to take the presentment or not. *Attwood* v. *Monger*, Style, 378 (1653).

(*c*) The decision in Chamberlain *v.* Prescot is, I think, inconsistent with that in Jones *v.* Gwynn.

* CHAPTER IV. [* 28]

MALICE AND WANT OF REASONABLE CAUSE MUST CONCUR.

It is the principle rule of actions for malicious prosecution that the plaintiff, in order to succeed, must prove both that the defendant's conduct in prosecuting him was malicious, and also that he had no reasonable cause for the prosecution (*a*).[1] This was clearly established in the *Anonymous case*, 6 Mod. 73 (1704), which is occasionally also cited as *Warren* v. *Matthews*. There the Court held, "That let a prosecution be never so maliciously carried on, yet if there be *probable* cause or ground for it no action for malicious prosecution will lie."[2] This has been held to be law ever since, the authority perhaps most often cited being that of Lord Mansfield and the Court of King's Bench in *Farmer* v. *Darling* (*b*), 4 Burr. 1971 (1766).

The rule that whether there was malice is a question of fact, and whether there was reasonable cause a question of law, or, at any rate, a question for the judge, is discussed later, in Chapter VII. Juries have often been * told that they [* 29] are at liberty to infer malice from a judicial direction that there was a want of reasonable cause. This, for reasons that will presently appear, is a direction which juries are less likely

(*a*) The plaintiff must give sufficient evidence to establish a *primâ facie* negative proof that the defendant had not reasonable cause for prosecuting (*Abrath* v. *N. E. R. Co.* *Vide post*, p. 107).

(*b*) In this case counsel said that the amount of damages was not excessive as against the defendant, because he was sheriff of London, and might have been excused if he had been worth less than 15,000*l*.

[1] To support the action there must be proof of want of probable cause and of malice: Wheeler *v.* Nesbitt, 24 How. 544 (1860); Dinsmore *v.* Wilkes, 12 Id. 401; Blunt *v.* Little, 3 Mason, 102 (1822); Preston *v.* Cooper, 1 Dill, 589; Zantzinger *v.* Weightman, 2 Cr. C. C. 478; Marks *v.* Townsend, 97 N. Y. 590; Good *v.* French, 115 Mass. 201; Gilliford *v.* Windel, 108 Pa. 142 (1884), Gordon, J.; Bernar *v.* Dunlap, 94 Id. 329; Eberly *v.* Rupp, 90 Pa. 259 (1879); Dickinson *v.* Maynard, 96 Am. Dec., 379 note 381; Morton *v.* Young, 92 Id. 565 note 568; Alexander *v.* Harrison, 90 Id. 431 note 438.

[2] The essential ground of the action is the institution of proceedings against the plaintiff in some court of law and without probable cause: Mr. Justice Steele in Drew *v.* Potter, 39 Vt. 189 (1867).

to get in future. It was emphatically laid down by Lords Mansfield and Loughborough, in *Sutton* v. *Johnstone*, 1 T. R. 493, and in error, 510 (1786), that want of reasonable cause cannot be inferred from malice.[1]

The case was an extremely important one on many grounds; and this seems a suitable place to give some account of it. Sutton, the plaintiff, was a captain in the navy, and was in command of the *Isis*, which was one of the ships forming a squadron under the command of Johnstone the defendant. The *Isis* having been much damaged in action, it was physically impossible for Sutton to obey an order given by Johnstone that the ships should advance in line. Accordingly he did not obey it, though, in the words of the declaration, he "did not wilfully and willingly disobey" it. Johnstone thereupon placed him under arrest, and kept him under arrest for three years, at the end of which time he was tried by court martial for disobedience to orders whereby the public service was hindered and an opportunity of escape was afforded to the enemy, and acquitted, on the ground that he had done all that was possible under the circumstances. The jury found a verdict for 6,000*l.*, which appears from the report to have been a very fair decision on the merits, and the Court of Exchequer refused a rule for a new trial, on the grounds that the long period be-
[*30] tween arrest and trial was evidence of *malice (which it certainly was), and that the condition of Captain Sutton's ship, which was not in dispute, and must have been known to the defendant, was evidence of want of reasonable cause. The case was argued in error before Lords Mansfield and Loughborough, the principal assignment of error being that it appeared from the declaration that there was reasonable cause for the prosecution. They reversed the judgment of the Court of Exchequer, in a judgment of which the following are the most material parts:—

(*c*) "There is no similitude or analogy between an action of tres-

(*c*) At p. 544.

[1] The proof of malice does not establish the want of probable cause, but that must be shown independently of it: Hurd *v.* Shaw, 20 Ill. 354; Wade *v.* Walden, 23 Id. 425; Israel *v.* Brooks, Id. 575; Chapman *v.* Cawrey, 50 Id. 512; Mitchinson *v.* Cross, 58 Id. 366; Krug *v.* Ward, 77 Id. 603; Casperson *v* Sproule, 39 Mo. 39; Callahan *v.* Caffarata, Id. 136; Sharpe *v.* Johnston, 76 Id. 660 (1882); Kidder *v.* Parkhurst, 3 Allen, 393; Cloon *v.* Gerry, 13 Gray, 201; Travis *v.* Smith, 1 Pa. 234; Malone *v.* Murphy, 2 Kans. 250; Hall *v.* Hawkins, 5 Humph. 357; Heyne *v.* Blair, 62 N. Y. 19; Bell *v.* Pearcy, 5 Ired. 83.

pass or false imprisonment and this kind of action. An action for trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the face of it, is manifestly legal.

The essential ground of this action is, that a legal prosecution was carried on *without a probable cause.*[1] We say this is emphatically the essential ground, because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied.

"From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied.

"From the most express malice the want of probable cause cannot be implied.[2]

"A man, from a malicious motive, may take up a * prosecution for real guilt, or he may, from circumstances [* 31] which he really believes proceed upon apparent guilt; and in neither case is he liable to this kind of action (*d*).

"After a verdict, the presumption is that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury.[3] In this case, to support the verdict, there was nothing necessary to

(*d*) Warren *v.* Matthews, 6 Mod. 73.

[1] To maintain an action for malicious prosecution the plaintiff must prove, first, that the defendant instituted the former action against the plaintiff; secondly, that it was without probable cause; thirdly, that it was accompanied by malice; fourthly, that the former suit terminated favorably to the plaintiff in the present action: Miller *v.* Mulligan, 48 Barb. 30 (1866), Ingalls, J.; Boyd *v.* Cross, 35 Md. 194 (1871), Alvey, J.

As to circumstances necessary to found the action: McCardle *v.* McGinley, 86 Ind. 538; Bitz *v.* Meyer, 11 Vroom, 252.

[2] Want of probable cause is sufficient evidence of malice, but the most express malice is not a sufficient ground to infer want of probable cause: Pangburn *v.* Bull, 1 Wend. 345; Ulmer *v.* Leland, 1 Greenleaf, 135; Marshall *v.* Maddock, Little's Sel. Cas. 107; Williams *v.* Vaumeter, 8 Mo. 339—342.

[3] What is a sufficient declaration: Graham *v.* Noble, 13 S. & R. 233 (1833), Tilghman, J.; Weinberger *v.* Shelly, 6 W. & S. 336. Malice should be alleged in the declaration and if want of probable cause is not averred the omission is cured by verdict: Griffith *v.* Ogle, 1 Binn. (Pa.) 172; *contra* Gibson *v.* Waterhouse, 4 Greenleaf, 220; Ellis *v.* Thilman, 3 Call. 3; Young *v.* Gregorie, Id. 446; Davis *v.* Clough, 8 N. H. 157; Maddox *v.* McGinnis, 7 Monroe, 371.

The fact that the suit is terminated should be set forth but if omitted is cured by verdict: Cardinal *v.* Smith, 109 Mast. 158.

In Vermont an averment of a charge an arrest and aquittal without any mention of any Court or process and without profert of the record of any judical proceeding makes the declaration insufficient: Drew *v.* Potter 39 Verm. 189 (1867), Steele, J.

be proved, but that there was no probable cause from which the jury might imply malice, and might imply that the defendant knew there was no probable cause.

"The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; [1] and upon this distinction proceeded the case of *Reynolds* v. *Kennedy*, 1 Wils. 232."

The judgment goes on to point out that the declaration, and the sentence of the court-martial, showed that the plaintiff had in fact disobeyed the order of his commanding officer, although he was justified in disobeying it by the only possible justification, namely, that it was impossible for him to obey. Hence it appeared that the question the court-martial had to decide was whether it was possible or impossible for Sutton to obey the orders he received.

This is not altogether easy to reconcile with the [* 32] * judgment of Parker, C. J., in *Jones* v. *Gwynn*, 10 Mod. 214; and Gilb. K. B. 185 (1713). In that case the defendant had indicted the plaintiff for exercising the faculty of a badger without being licensed thereto. It was objected on behalf of the defendant that it appeared from the declaration that the plaintiff was a badger, which was "the affirmative part of the indictment, and he having licence must be shown on the defendant's part," and that therefore the declaration showed reasonable cause for the prosecution. The Chief Justice replied that the offence charged in the indictment was "not the bare using of the fac-

[1] Probable cause is a question of law to be determined by the Court upon the facts of the case: Greenwade *v.* Mills, 31 Miss. 464, Busst *v.* Gibbons, 6 H. & N. 912; Sweet *v.* Negus, 30 Mich. 460; Thompson *v.* Force, 65 Ill. 370; Harkrader *v.* Moore, 44 Cal. 144; Swaim *v.* Stafford, 4 Ired. 392; Ulmer *v.* Leland, 1 Me. 135; Cooper *v.* Waldron. 50 Id. 80; Speck *v.* Judson. 63 Id. 207; Boyd *v.* Cross, 35 Md. 194; McWilliams *v.* Hoban, 42 Id. 56; Masten *v.* Deys, 2 Wend. 424; Waldheim *v.* Sickel, 1 Hilton, 45.

When the question of probable cause becomes a mixed question of law and fact it must be given to the jury under proper instructions from the Court: Humphriss *v.* Parker, 52 Me. 502; Heyne *v.* Blair, 62 N. Y. 19; Cole *v.* Curtis, 16 Minn. 182; Driggs *v.* Burton, 44 Vt. 124; Sims *v.* McLendon, 3 Strobh. 557. Then the existence of the facts relied on to constitute the want of probable cause is for the jury, but the question of what amounts to the want of probable cause is for the court: Boyd *v.* Cross, 35 Md. 194 (1871), Alvey, J.; Wilmarth *v.* Mountford, 4 Wash. C. C. 79; Stewart *v.* Somebom, 8 Otto. 187 (1878); Walbridge *v.* Pruden, 6 Out. 1 (1882), Sterrett, J.; Bell *v.* Mathews, 37 Kans. 686 (1887).

ulty of a badger," but doing it unlicensed. If it were otherwise, there should be reasonable cause to indict every badger in England. Might it not be said, in *Johnstone* v. *Sutton*, that the offence charged against Captain Sutton was not merely failing to obey his orders, but voluntarily failing, or failing without justification, to obey them? It is probable that in military law, as administered by courts martial, the presumption is against a defendant who loses his ship or fails from any cause to obey orders, but the result seems to be that if a misfortune such as befell Captain Sutton is *ipso facto* reasonable cause for prosecution, the prosecutor is free to conduct his prosecution with as much malice as he pleases, subject only to liability for false imprisonment. Lords Mansfield and Loughborough conclude this part of their judgment as follows:—"Under all these circumstances, we have no difficulty to give our opinion, that in law, the commodore had a probable cause to bring the plaintiff to a fair and impartial trial

* "The probable cause goes to both parts of the charge; [* 33] the disobedience and obstructing the public service. But if it went to the disobedience only, it would equally avail the defendant in this cause. For it is not like the case put of a plaintiff recovering, where he lays, in the same sentence, words actionable, and words not actionable.

"Here the defendant alleges a justification of the arrest, suspension, and trial. If his justification be allowed, there is an end of the action."

In conclusion, the judgment expresses a doubt whether an action for malicious prosecution lies at all against an officer in the King's service for bringing his subordinates on active service to a court martial. The subject is considered in Chapter IX.

[* 34]

* CHAPTER V.

EVIDENCE OF MALICE.

It may be asserted that the word malice, in this connection, has no technical meaning, but may be more aptly defined—or rather explained—as spite, than in any other way. It has often been described as (among other things) an "indirect motive," [1] which is not a particularly happy or intelligible phrase. It matters the less what it is, because juries are at liberty to infer its existence if they think there was no reasonable cause, and they are generally ready to do so. In some of the early cases of malicious indictment, notably *Jones* v. *Gwynn*, 10 Mod. 214 (1713), malice was declared to be a term of law, which appears to have meant that it was a technical way of saying that there was no reasonable cause. In malicious indictment it was enough to say that the defendant indicted the plaintiff *falso et malitiose* without adding *sine rationabili et probabili causâ*, though these latter words were necessary in malicious prosecution. As no one sues now for malicious indictment, the distinction is obsolete, and in any case the ease with which pleadings can be amended would have made it so. The reason why malice has held its place alongside of want of reasonable cause as a part of the cause of action, is

[* 35] the rule that reasonable cause is a question of law. * Substantially it has for a long time been law that malice is a question of fact, and the directions to juries as to what is malice, or what malice is, have not been many.

[1] By malice is meant not the act but the wrongful motive which prompts the act: Garvey *v.* Wayson, 42 Md. 178 (1878), Grason, J.; Harpham *v.* Whitney, 77 Ill. 32 (1875), Sheldon, J. Malice is of two kinds; malice in fact or express malice and malice in law or implied malice; the former includes not only ill will, resentment, personal hatred, but any act done wilfully and to the prejudice of another: Pullen *v.* Glidden, 66 Me. 202 (1877), Libbey, J.; and in either case it must be established to sustain the action: Kerr *v.* Williamson, Addison, 270. As to what constitutes malice: Shaul *v.* Brown, 28 Iowa, 37; Dennis *v.* Ryan 65 N. Y. 385; Schofield *v.* Ferrars, 47 Pa. 194; Richter *v.* Koster, 45 Ind. 440 (1874), Downey, J.; Johnson *v.* Ebberts, 6 Saw. 538; Tibbier *v.* Alfred, 12 Fed. Rep. 264.

For reasons which will presently appear, I am of opinion that the whole of the distinction between malice and want of reasonable cause is obsolete, and that it would greatly conduce to a clear understanding of the law of malicious prosecution if the supposed necessity of proving malice were done away with altogether, and the question of reasonable cause frankly recognized as a question of fact for the jury, as I shall argue that it practically has been, at least since the decision of the House of Lords in *Abrath* v. *N. E. R. Co.*[1] In the present chapter I shall merely enumerate the principal cases in which decisions have been given as to what does or does not constitute malice.

In *Chambers* v. *Robinson*, 2 Str. 691 (1732), Chief Justice Raymond "allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding of the indictment and other scandalous matter . . . as a circumstance of malice."

Sinclair v. *Eldred*, 4 Taunt. 7 (1811), was an action for malicious arrest. The defendant had made an affidavit of debt, and had held the plaintiff to bail, and had afterwards suffered judgment of *non pros.* to go against himself. Lord Mansfield held that this was no evidence of malice, because he might have abandoned his action by reason of the loss of a document or the death of a witness.

In *Snow* v. *Allen*, 1 Star. N. P. C. 502 (1816), which
* was tried at *nisi prius* before Lord Ellenborough, the [* 36]
defendant had arrested the plaintiff on a judgment, after having previously arrested his bail. The plaintiff's attorney had warned the defendant's attorney that the arrest would be unlawful, but the defendant's attorney had been otherwise advised by counsel, and relied on *Higgin's case* reported in Cro. Jac. 320. Lord Ellenborough nonsuited, on the ground that however ignorant the defendant's attorney had been, the plaintiff could not recover unless he could "show that the defendant had been actuated by some purposed malice."

The same judge tried the case of *Brookes* v. *Warwick*, 2 Star.

[1] The principle that both malice and want of probable cause must be established has been upheld in the American Law: Murray *v.* Long, 1 Wend. 140; Foshay *v.* Ferguson, 2 Denio, 617; Stone *v.* Crocker, 24 Pick. 81; Plummer *v.* Noble, 6 Greenleaf, 285; Lyon *v.* Fox, 2 Browne, 67; Winebiddle *v.* Porterfield, 9 Barr, 137, and cases cited in Munns *v.* Dupont, 1 Amer. Lead., Cas. 223.

N. P. C. 389 (1818), in which the facts were that the defendant who was an inspector of a bank, brought back from the bank a note stamped "forged" to the plaintiff, who was one of the payees of it. A dispute arose as to who was entitled to keep it, and upon the plaintiff refusing to give it up, the defendant prosecuted him for being feloniously in possession of it. The judge held that there was no probable cause for the prosecution, and directed the jury that "to press a commitment under circumstances like the present was such a *crassa ignorantia* that it amounted to malice."

In *Caddy* v. *Barlow*, 1 Man. & R. 275 (1827), the plaintiff and her brother, both being infants, had been jointly prosecuted by the defendant. At the trial of the action, to which the plaintiff's brother was not a party, Vaughan, B., admitted evidence that the defendant ill-treated the brother in the plaintiff's absence, when both the plaintiff and her brother were in custody,
[* 37] *in order to induce him to prefer a criminal charge against their father. The Court of Queen's Bench (Lord Tenterden, L. C. J., and Bayley, Holroyd, and Littledale, JJ.) held that this evidence was rightly admitted, on the grounds that it was part of the *res gestæ* and showed *malus animus*, and "unlawful motives" in the defendant.

Mitchell v. *Jenkins*, 5 B. & Ad. 588 (1833), was an action for malicious arrest. The defendant had arrested the plaintiff for a debt of 45*l.*, though the defendant was entitled to a set-off of 16*l.*, so that in reality only 29*l.* was due. The officer told the plaintiff when he arrested him that he was prepared to accept the smaller sum in satisfaction. Taunton, J., directed the jury that these circumstances showed malice in law, and that they must find for the plaintiff. This was held to be a misdirection. Lord Denman, L. C. J., was of opinion that malice is altogether a question for the jury. Parke, J., said, in the course of his judgment, "The term malice in this sort of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." I confess that I do not understand what this means. If *malus animus* does not mean spite or hatred, it must, one would think, be a term of art, with some meaning capable of being expressed in English. As to an improper motive, the only improper motive can be a wish to injure the party rather

than to vindicate the law, and if that is not spite or hatred it is very like it. As to an indirect motive, *unless [* 38] it means an improper motive, it is impossible to suggest what it does mean.

Musgrove v. *Newell*, 1 M. & W. 582 (1836), is a case turning chiefly on reasonable cause, and is discussed from that point of view hereafter (*a*). In so far as it deals with evidence of malice, the material facts were that, upon the defendant giving the plaintiff in charge, the constable, who knew the plaintiff, offered explanations, to which the defendant refused to listen. Lord Denman said that "malice," "in actions of this nature, was not confined to the ordinary meaning of the word *malice*, but comprehended any improper motive." He directed the jury that if they thought the defendant persisted in his charge from "obstinacy or feelings of wounded pride," and that the defendant either did not believe, or ought not to have believed, in his charge when he preferred it before the magistrate, his conduct was malicious, and they should find for the plaintiff. After a verdict for the plaintiff, the Court of Exchequer made a rule absolute for a new trial, chiefly on the ground of misdirection as to reasonable cause, but also because, in their opinion, there was no evidence of malice. If the case were to occur again, it may be doubted whether it would be decided in the same way. Considering that a jury may infer malice from want of reasonable cause,[1] it is hard to see how a judge can now stop a case on the sole ground that there is no evidence of malice, and the case of *Mitchell* v. *Jenkins*, quoted above, confirms this view.

*In *Haddrick* v. *Heslop*, 12 Q. B. 267 (1848), the [* 39]

(*a*) *Vide post*, p. 44.

[1] Malice need not be affirmatively proved but may be inferred from want of probable cause or the zeal and activity of the prosecutor: Cecil *v.* Clarke, 17 Md. 508; Straus *v.* Young, 36 Id. 246 (1872), Grason, J.; Cooper *v.* Utterbach, 37 Md. 282; Flickinger *v.* Wagner, 46 Id. 581; Dietz *v.* Langfit, 63 Pa. 234; Schofield *v.* Ferrars, 47 Id. 194; Paukett *v.* Livermore, 5 Clarke, 277; White *v.* Tucker, 16 Ohio, 468; Ammerman *v.* Crosby, 64 Ind. 451; Blass *v.* Gregor, 15 La. Ann. 421; McKown *v.* Hunter, 30 N. Y. 625; Pangburn *v.* Bell, 1 Wend. 345; Williams *v.* Taylor, 6 Bing. 183; Closson *v.* Staples, 42 Vt. 209; Mowry *v.* Whipple, 8 R. I. 360; Harpham *v.* Whitney, 77 Ill. 32; Merriman *v.* Mitchell, 13 Me. 438; Garrison *v.* Pearce, 4 E. D. Smith, 255; Harkrader *v.* Moore, 44 Cal. 144; Holliday *v.* Stearling, 62 Mo. 321; Ewing *v.* Sanford, 19 Ala. 605; Bozeman *v.* Shaw, 37 Ark. 161 (1881), Eakin, J.; Blunt *v.* Little, 3 Mason, 102 (1822), Strong, J.; Wiggin *v.* Coffin, 3 Story, 1; Johnson *v.* Efforts, 6 Saw. 538. But this presumption is only *primâ facie* and may be rebutted: Boyd *v.* Cross, 35 Md. 194 (1871), Alvey, J.; Bell *v.* Graham, 1 Nott & McCord, 278; Ray *v.* Law, Peter C. C. 207.

main evidence of malice was that the defendant, having been defendant in another suit in which the plaintiff had given evidence against him, upon receiving from someone else an account of the evidence the plaintiff had given, declared that he would indict him for perjury. His informant said that there was no ground for such an indictment, and the defendant answered that even if there were not it would tie up the mouths of the plaintiff, and of the plaintiff in the former action, for a time, and that he (the defendant) would move for a new trial. He did indict the plaintiff, and thence the action. Wightman, J., asked the jury whether they thought he indicted him from malice. The jury answered "that the word malice was strong," but that he indicted him " from an improper motive." The Court of Queen's Bench (Lord Denman, C. J., Coleridge, Wightman, and Erle, JJ.) refused a rule for a new trial applied for on the ground of misdirection.

In *Stevens* v. *Midland Counties Rail. Co. and Lander*, 10 Exch. 352 (1854), the defendant Lander was the superintendent at Derby of the defendant company. The plaintiff had a small piece of the company's tarpauling in his possession, and Lander prosecuted the man from whom the plaintiff had got it for larceny. The grand jury threw out the bill. Lander then insisted on having a warrant against the plaintiff for receiving, "to punish someone in order to deter others, &c." A rule to enter the verdict for the defendants was discharged as to Lander. It [* 40] was made absolute as *to the company upon other grounds. It was in this case that Baron Alderson expressed the well-known opinion, still held by Lord Bramwell, that no action for malicious prosecution lies against a corporation aggregate, because it has no mind, and therefore cannot be malicious (*b*).[1]

The jury may, of course, infer malice from the behaviour of the defendant subsequently to the beginning of the prosecution. *Heath* v. *Heape*, 1 H. & N. 478; 26 L. J. M. C. 49 (1856).

(*b*) *Vide post*, p. 87.

[1] See note page 86.

* CHAPTER VI. [* 41]

EVIDENCE OF WANT OF REASONABLE CAUSE.

THE question of what amounts to proof of a want of reasonable cause for a prosecution is the central difficulty of actions for malicious prosecution.[1] In the present chapter I propose merely to enumerate the decisions which have been pronounced as to what did and what did not establish that the defendant prosecuted without a reasonable cause.[2] In the following chapter I

[1] Reasonable cause, as it is termed in the English law, is not a belief honestly entertained, for that of itself is not sufficient; but it is necessary, as Lord Campbell, C. J., says in Broughton *v.* Jackson, 18 Q. B. 378, 21 L. J. Q. B. 266 (1852), "that the defendant should show facts which would create a reasonable suspicion in the mind of a reasonable man. Also Perryman *v.* Lister, L. R. 3 Ex. 202, approved by Lord Hatherly, L. R. 4 H. L. 533 (1870). Probable cause, as it is termed in the American Law, may be understood to be such conduct on the part of the accused as may induce the Court to infer that the prosecution was undertaken from public motives: Ulmer *v.* Leland, 1 Greenleaf, 135; Thompson *v.* Mussey, 3 Id. 306. The defendant in a criminal prosecution was found guilty, but upon a new trial a *nolle prosequi* being entered, the defendant was discharged; it was held that the action could be maintained and the first verdict was no evidence of probable cause: Richter *v.* Coster, 45 Ind. 440 (1874). The verdict of guilty is strong *primâ facie* evidence of probable cause but capable of being rebutted: Payson *v.* Caswell, 22 Me. 212; Herman *v.* Brooherhoof, 8 Watts, 240; Jones *v.* Kirksey, 10 Ala. 839; and a judgment is sufficient evidence of probable cause to defeat the action although reversed on appeal: Palmer *v.* Avery, 41 Barb. 290 (1864), Bacon, J.; Reynolds *v.* Kennedy, 1 Wilson, 232; Whitney *v.* Peckham, 15 Mass. 243; Welsh *v.* R. R. Co., 14 R. I. 609 (1884), Carpenter, J.; Clements *v.* Apparatus Co., 67 Md. 461 (1887), Robinson, J.; *contra* Ash *v.* Morton, 20 Ohio, 119; Ewing *v.* Sanford, 19 Ala. 605. Yet it is not conclusive evidence, for it may be impeached for fraud, conspiracy, perjury or subordination: Cloon *v.* Gerry, 13 Gray, 201; Whitney *v.* Peckham, 15 Mass. 143.

[2] A discharge by a magistrate: Orr *v.* Seiler, 1 Pennypacker (Pa.), 445; or the rejection of the bill by the grand jury: Garrard *v.* Willett, 4 J. J. Marshall, 628 (1830); Potter *v.* Casterline, 12 Vrooom, 22 (1879), Woodhull, J.; Johnson *v.* Miller, 63 Iowa, 529 (1884), Seevers, J.; or the voluntary discontinuance of a former suit is *primâ facie* evidence of want of probable cause: Burhaus *v.* Sanford, 19 Wend. 417; Wetmore *v.* Mellinger, 64 Iowa, 741 (1884); *contra* Palmer *v.* Avery, 41 Barb. 290 (1864). But a mere acquittal on trial: Williams *v.* VanMeter, 8 Mo. 339; Stone *v.* Crocker, 24 Pick. 81; Bitting *v.* Ten Eyck, 82 Ind. 421, 28 Myers' Fed. Dec. Sec. 662; or an entry of *nol. pros.*: Yocum *v.* Polly, 1 B. Mon. 358, *contra* Richter *v.* Koster, 45 Ind. 440 (1874); or the offer to compromise is *not* evidence of want of probable cause: Gilliford *v.* Windel, 108 Pa. St. 142 (1884), Gordon, J.; Emerson *v.* Cochran, 111 Id. 619 (1886).

shall trace the decline of the original doctrine, that the question whether the defendant has been shown to have acted without reasonable cause is one for the judge, and the growth of what I hold to be the modern practice that, notwithstanding the embarrassing survival of a rule which has become fictitious, this question is one which juries are called upon to decide, and do decide.

Some account of the case of *Johnstone* v. *Sutton* has been given in a previous chapter. The principal ground of the decision in the defendant's favour was that it appeared from the declaration that the plaintiff was prosecuted for not having obeyed a particular order of his commanding officer, and that he had not in fact obeyed it. Lords Mansfield and Loughborough held that this amounted to reasonable cause for the prosecution,
[*42] * and that the fact that the plaintiff had had a good defence to the prosecution was immaterial.

Where the prosecution sued for was one for assault, the question of want of reasonable cause will probably turn upon whether the defendant was really the injured party in the assault, or whether he began it. In *Hinton* v. *Heather*, 14 M. & W. 131 (1845), it appeared that the defendant had to some extent provoked and assaulted the plaintiff on his own premises, whereupon the plaintiff threw the defendant downstairs and out of the house, for which the defendant indicted him for assault. Pollock, C. B., directed the jury that if when the defendant began the prosecution he knew that the plaintiff had not exceeded his lawful rights of repelling violence, and turning out an intruder, there was a want of reasonable cause; but that if he knew that the plaintiff had been more violent in putting him out than under the circumstances he had a right to be, there was no want of reasonable cause. Alderson and Rolfe, BB., held this direction to have been right. At the same time they threw some doubt upon an older case of *Fish* v. *Scott*, Peake, 135 (1792). In that case counsel opened the following facts:—Scott hit Fish, and Fish returned the blow. They then went to a field and fought, after which Scott indicted Fish for assault. Upon this opening, Kenyon, C. J., nonsuited, on the ground that the fact of the defendant, who preferred the indictment, having also been the original aggressor, could not amount to a want of reasonable cause.

Scheibel v. *Fairbairn*, 1 B. & P. 388 (1799), is one of
[*43] * the earlier cases showing that whether or not the de-

fendant has reasonable cause to prosecute depends upon what was his information and belief when he did so. It was an action for malicious arrest, the circumstances being that between the issue of the writ and the arrest the debtor satisfied the debt. It was held that this did not show want of reasonable cause, because the defendant was not bound to send to prevent the writ being executed, and the plaintiff might, before paying, have inquired whether a writ had been taken out or not. Rooke, J., observed that it was a question of law whether the defendant sent to prevent the writ from being executed in reasonable time or not. Probably, at the present time, it would be a question for the jury.

In the closely similar case of *Gibson* v. *Chaters*, 2 B. & P. 129 (1800), Lord Eldon nonsuited; and a rule to set aside the nonsuit was refused.

Ravenga v. *Mackintosh*, 2 B. & C. 693 (1824), is an authority as to the relevance of having taken counsel's opinion before prosecuting.[1] The action was one for malicious arrest; and the evi-

[1] It is remarkable with what indecision the books speak of the manner in which the advice of counsel constitutes a defence. Some of the cases hold that it is proof of probable cause: Ross *v.* Irvine, 26 Ill. 259; LeMaister *v.* Hunter, Bright, 495; Laughin *v.* Clawson, 27 Pa. St. 330; Fisher *v.* Flower, 33 Id. 501; Olmstead *v.* Partridge, 16 Gray, 383; Potter *v.* Seale, 8 Cal. 217; Levy *v.* Brannan, 39 Id. 485; Besson *v.* Southard, 10 N. Y. 236; Murray *v.* McLain, 2 Car. Law Rep. 186. Some cases maintain it disproves malice: Murphy *v.* Larson, 77 Ill. 172; Center *v.* Spring, 2 Clarke, 393; Rover *v.* Webster, 3 Id. 502; Sommer *v.* Wilt, 4 S. & R. 20; Stanton *v.* Hart, 27 Mich. 539; Williams *v.* Van Meter, 8 Mo. 339; Davenport *v.* Lynch, 6 Jones, L. 545; Cooper *v.* Utterbach, 37 Md. 282 (1872), Bowie, J. While others, and it is believed the majority of cases, refer to it as establishing both the absence of malice and the presence of a probable cause: Wilkinson *v.* Arnold, 11 Ind. 45; Galloway *v.* Stewart, 49 Id. 156; Gould *v.* Gardiner, 8 La. Ann. 11; Phillips *v.* Bonham, 16 Id. 387; Bartlett *v.* Brown, 6 R. I. 37; Newton *v.* Weaver, 13 Id. 616 (1882), Matterson, J.; Wicker *v.* Hotchkiss, 62 Ill. 107; Palmer *v.* Richardson, 70 Id. 545; Davie *v.* Wisher, 72 Id. 262; Skidmore *v.* Bricker, 77 Id. 164; Stevens *v.* Fassett, 27 Me. 267; Soule *v.* Winslow, 66 Id. 447; Walter *v.* Sample, 25 Pa. 275; Emerson *v.* Cochran, 111 Id. 619 (1886), Gordon, J.; Stone *v.* Swift, 4 Pick. 389; Wilder *v.* Holden, 24 Id. 8; Stanton *v.* Hart, 27 Mich. 539 (1874), Campbell, J.; Ash *v.* Marlow, 20 Ohio, 119; Wood *v.* Weir, 5 B. Mon. 544; Lerney *v.* Williams, 32 Ark. 166; Turner *v.* Walker, 3 G. & J. 380; Chandler *v.* McPherson, 11 Ala. 916; Ames *v.* Rathbun, 55 Barb. 194; Bliss *v.* Wyman, 7 Cal. 257; Blunt *v.* Little, 3 Mason, 102; Burnap *v.* Albert Taney, 244; Johnson *v.* Daws, 5 Cr. C. C. 283; Schippel *v.* Norton, 38 Kans. 567 (1888), Valentine, J.

This defence will not avail, if the procurement of professional advice was used as a cloak for malice or as a matter of precaution: Glascock *v.* Bridges, 15 La. Ann. 672; Chapman *v.* Dood, 10 Minn. 350; Ames *v.* Rathbun, 55 Barb. 194; Kimball *v.* Bates, 50 Me. 308; Brown *v.* Randall, 36 Conn. 56; Prough *v.* Entriken, 11 Pa. 81; Schmitt *v.* Weidman, 63 Id. 173; Burnap *v.* Albert, Taney, 244; the facts must be presented for the opinion of *competent* counsel: Donnelly *v.* Daggert, 145 Mass. 314 (1887), Field, J.; and there

dence was that the defendant, before bringing against the plaintiff the action in which the plaintiff was arrested, took the opinion of "a special pleader of considerable eminence," who advised him that his action against the plaintiff lay; and that if he had him arrested on mesne process an action for malicious arrest would not lie. Abbott, L. C. J., directed the jury, that if they thought the defendant acted in good faith, relying on the opinion of counsel, and believing the plaintiff to be liable to the action, [*44] *they should find for the defendant; but if they thought he did not believe in his own cause of action, and relied on counsel's opinion only in so far as it gave him hopes that he would escape an action for malicious arrest, then he had no reasonable cause for the arrest. After a verdict for the plaintiff, it was held that this direction was right, and that the defendant had had no reasonable cause. In the course of his judgment, Bayley,

must be no concealment or fraud or corrupt use of such counsel: Sharpe *v.* Johnston, 59 Mo. 557, 21 Amer. Law Reg. 587.

Finally the defendant must act in good faith upon the advice received: Thompson *v.* Lumley, 50 How. Prac. 108; Hall *v.* Snydam, 6 Barb. 83; Potter *v.* Seale, 8 Cal. 217; Anderson *v.* Friend, 71 Ill. 475; Wetmore *v.* Mellinger, 64 Iowa, 741 (1884), Beck, J.

The defendant may set up this defence, although he did not submit to his counsel facts which he might have ascertained by reasonable diligence: Johnson *v.* Miller, 69 Iowa, 562 (1886), Reed, J.; or where the facts stated did not warrant an opinion given *bonâ fide:* Walter *v.* Sample, 25 Pa. 275 (1855), Woodward, J.

Counsel, whose opinion is asked, must not be jointly interested in the prosecution, nor should he act in bad faith towards his client, otherwise the defence will fall: Kendrick *v.* Cypert, 10 Humph. 291; Stone *v.* Swift, 4 Pick. 389; White *v.* Carr 71 Me. 558; and the facts upon which the opinion is founded is admissible to test the good faith of the defendant: Cooper *v.* Utterbach, 37 Md. 282 (1872), Bowie, J.; Watt *v.* Corey, 76 Me. 87 (1884), Libbey, J.; Peck *v.* Chouteau, 91 Mo. 140 (1886), Black, J.

A curious case arose in Missouri. The defendant followed counsel's advice and yet in commencing the suit, he was actuated by the desire to injure the plaintiff, and Hough, J., ruled that the action of malicious prosecution could be sustained: Sharpe *v.* Johnston, 76 Mo. 660 (1882).

The action on the case will lie for maliciously advising one to sue or prosecute without reasonable cause: Grove *v.* Brandenburg, 7 Blackford, 234; Mowry *v.* Miller, 3 Leigh, 561; Perdu *v.* Connerly, Rice, 49; Bicknell *v.* Dorian, 16 Pick. 478; Wood *v.* Weir, 5 B. Mon. 544.

Justices of the peace and those not regularly admitted to the bar as attorneys and counsellors have been held to be incompetent advisors: Sutton *v.* McConnell, 46 Wis. 269; Olmstead *v.* Partridge, 16 Gray, 381; Murphy *v.* Larson, 77 Ill. 172; Straus *v.* Young, 36 Md. 245 (1872), Grason, J. In Pennsylvania, the law on this point has been but recently settled. In the two decisions of Rosenstein *v.* Feigel, 6 Phila. 532 (1868), and Thomas *v.* Painter, 10 Id. 409 (1875), the advice of an alderman was considered a good defence. When the point was placed before the Supreme Court in Bernar *v.* Dunlap, 13 Nor. 329 (1880), it was left undecided, but in Brobst *v.* Ruff, 100 Pa. St. 91 (1882), Mr. Justice Mercur decided that such counsel was insufficient. Thus are the decisions made uniform in the states.

J., said: "I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description." Holroyd, J., thought it unnecessary to decide whether a party, influenced by a malicious motive, but believing by reason of counsel's opinion that he has a good cause of action, has reasonable cause for an arrest or not.

The case of *Musgrove* v. *Newell*, 1 M. & W. 582 (1836), has already been considered (*a*) in its relation to evidence of malice. As regards reasonable cause, it does not appear to be an authority upon which it would be well to rely. The circumstances were: that the plaintiff, who was a respectable person, was waiting for the mail on a bridge, with his servant, at 11 o'clock at night. While he was there, the defendant, who was riding across the bridge, was molested by a drunken man. He went and fetched a constable, and on his return found only the plaintiff, whom he gave in charge. The constable, who knew the plaintiff, assured * the defendant that he was a respectable person, [* 45] and that he, the constable would be answerable for him. The defendant, however, insisted on having the plaintiff arrested, and charged him before a magistrate with attempted robbery. Lord Denman, C. J., directed the jury that the defendant had reasonable cause for originally charging the plaintiff, but not for persisting in the charge after the constable's explanation. The Court of Exchequer (Lord Abinger, C. B., Bolland, Alderson, and Gurney, BB.) held this to have been a misdirection, on the ground that the constable's explanation could not alter the facts, though it might weaken the inference to be drawn from them; and that, therefore, if there was reasonable cause before the explanation there was also reasonable cause after. This ruling implies a distinction, which later cases, in my opinion, show to be fallacious, between the statements of the constable and the other facts of the case.

That reasonable cause depends upon the state of the defendant's mind, and the information which is present to it, when he institutes or carries on the prosecution, appears clear from *Delegal* v. *Highley*, 3 B. N. C. 950 (1837), which was an action for malicious

(*a*) *Vide*, p. 38.

prosecution and libel. The case was argued on demurrer to the plea to the court for malicious prosecution. This was a plea of justification, and is described in the judgment of the Court of Common Pleas (delivered by Tindal, C. J.) as setting out "the several facts and circumstances attending the transaction out of which the charge before the Lord Mayor arose. To this [* 46] plea there is a special * demurrer, alleging as one ground of objection that it contains no allegation that the defendant, at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on, those facts and circumstances." This defect was held fatal to the plea, although it contained the words "wherefore the defendant had reasonable and probable cause to believe, and did believe," that the charge was well founded. If the pleader had specified the time at which the defendant so believed, the allegation would have been sufficient. "The gravamen of the declaration is that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time." "The defendant (*b*) would have failed at the trial if he had not proved that the facts of the case had been communicated to him, or, at all events, so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man previous to the charge being laid before the magistrate."

The view of the law suggested by the judgment in *Delegal* v. *Highley* is confirmed by the case of *Broad* v. *Ham*, 5 B. N. C. 722 (1839). In this case the plaintiff had absconded, and the stolen goods were found in his box, but there was also some evidence that, notwithstanding these facts, the defendant had not in fact believed the plaintiff to be guilty, and had prosecuted in order to compel the plaintiff to pay a debt. The judge (*c*) told [* 47] the jury that "the plaintiff must show * malice in the defendant, and want of probable cause for the charge; that the absconding of the plaintiff and the finding the cheque in his box *primâ facie* afforded probable cause for proceeding against him; but if the jury thought the defendant himself believed the plaintiff had not committed a felony, that was *some* evidence of the absence of probable cause." Upon this direction there was

(*b*) The report says "plaintiff"; but the meaning is clear.
(*c*) It does not appear who he was.

a verdict for the plaintiff, and the Court of Common Pleas refused to disturb it.

To the same general effect is the case of *Turner* v. *Ambler*, 10 Q. B. 252 (1847). The plaintiff, who was the defendant's tenant, in the course of making alterations to the premises, sold, contrary to the terms of his agreement, some fixtures which belonged to the defendant. The defendant thereupon prosecuted him for larceny. The plaintiff suggested that the purpose of the prosecution was to compel him to give up his tenancy. Lord Denman, C. J., "left it to the jury to say whether the defendant had acted maliciously, and, with reference to that question, whether the evidence showed, in point of fact, such want of probable cause for the prosecution as amounted to prove that the defendant had instituted it from motives of malice." On the authority of *Panton* v. *Williams* (*d*) he reserved "the question of probable cause, as distinct from that of motive, to be decided by himself as a question of law." After a verdict for the plaintiff, the Chief Justice held that want of reasonable and probable cause had not been proved, and entered a verdict for the *defend- [*48] ant, giving leave to move. The subsequent motion failed.

Lord Denman, in delivering the judgment of the Court, said: "The prevailing law of reasonable and probable cause is, that the jury are to ascertain facts, and the judge is to decide whether those facts amount to reasonable and probable cause. But among the facts to be ascertained is the knowledge of the defendant of the existence of those which tend to show reasonable and probable cause, because without knowing them he could not act upon them; and also the defendant's belief that the facts amounted to the offence which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the belief that he had a right to prosecute. In other words, the reasonable and probable cause must appear not only to be deducible in point of law from the facts, but to have existed in the defendant's mind at the time of his proceeding; and perhaps whether they did so or not is rather an independent question for the jury, to be decided on their view of all the particulars of the defendant's conduct, than for the judge, to whom the legal effect of the facts only is more properly referred." Lord Denman then pointed out that

(*d*) *Vide post*, p. 63.

the doctrine laid down in *Broad* v. *Ham* (*e*)—that the defendant not in fact having believed the plaintiff to be guilty, though there was *primâ facie* cause for his doing so, but having prosecuted from an ulterior motive, was evidence of want of reasonable cause —"must, however, be qualified by the necessity of re-
[* 49] quiring *proof of the * absence of that belief*, when reasonable and probable cause is established. There was none such here." "The unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable and probable cause; for the contrary belief is perfectly consistent with malice."

Although what is reasonable cause is a question, to a great extent, of the defendant's belief and information, it seems that his own ignorance in fact of the law which he sets in motion is not reasonable cause.[1] In *Huntley* v. *Simpson*, 27 L. J. Ex. 134 (1857), the plaintiff had carried off the defendant's timber under a claim of right, asserting that he had a lien upon it. The prosecution took place three days after the plaintiff, in conversation with the defendant, had asserted his claim of right. Channell, B., held that this showed a want of reasonable cause, and the Court of Exchequer held the direction good. Bramwell, B., said, "It is a blunder on the part of the defendant, and it is one of those blunders which it is just as well that anybody should be punished for." See, also, on this point, *Heath* v. *Heape*, 1 H. & N. 478; 26 L. J. M. C. 49 (1856).

A defendant who is responsible only for part of a prosecution may have reasonable cause for that part, although he might not have had it for instituting the prosecution. In *Weston* v. *Beeman and another*, 27 L. J. Ex. 57 (1857), the plaintiff had been prosecuted for larceny, alleged to have been committed by the sale

(*e*) *Vide supra*, p. 46.

[1] As to what constitutes *probable* cause, as it is called in the American Law, or *reasonable* cause, as it is called in the English cases: Harpham *v.* Whitney, 77 Ill. 32 (1875), Sheldon, J.; Wengert *v.* Beashore, 1 P. & W. 232; Beach *v.* Wheller, 30 Pa. St. 69; Eberly *v.* Rupp, 90 Id. 259; Ross *v.* Irvine, 85 Am. Dec. 373, note 381; Johnson *v.* Miller, 50 Am. Rep. 758; Bitting *v.* Ten Eyck, 82 Id. 505; Shaule *v.* Brown, 4 Id. 151, 28 Myers' Fed. Dec. Sec. 657.

As to what constitutes want of probable cause: Hermann *v.* Brookerhoff, 8 Watts, 240.

The question of probable cause depends solely upon the *belief* of the prosecutor concerning the guilt or innocence of the accused: Miller *v.* Milligan, 48 Barb. 30 (1866), Ingalls, J.; and floating rumors are not an adequate foundation for such a belief: Smith *v.* Ege, 52 Pa. St. 419 (1865), Strong, J.

of cattle which he had assigned to the defendants as security *for an advance. He had a Chancery suit [*50] against the defendants for an account pending at the time. The summons had been taken out by the defendants' agent, with the advice of their attorney, but without their authority. The defendants were present at the hearing of the summons, which was dismissed. After a verdict for 20*l.* the Court of Exchequer, made absolute a rule to set aside the verdict, and enter it for the defendants. Bramwell and Watson, BB., said, that the defendants had done nothing but attend the summons which had already been taken out, and that until they heard the evidence they knew nothing of the circumstances. Moreover, it was not certain that what the defendant did did not amount to larceny. The evidence did not show that there was no reasonable and probable cause.

Where parish officers summoned a bankrupt before justices for rates due, and finally had him arrested on the justices' warrant of commitment, the facts that they knew of his bankruptcy, and that his examination had been adjourned, and that he had obtained an order protecting him from arrest during such period as the Court of Bankruptcy thought proper under the then law of bankruptcy, and that he claimed freedom under this order from arrest for rates, and contended that the parish ought to prove for the rates under the bankruptcy, were held to be no evidence that the parish officers had not reasonable cause for the arrest, and no evidence of malice. *Phillips* v. *Neylor*, 3 H. & N. 14, and in the Exchequer Chamber, 4 H. & N. 565 (1858–9).

The circumstances relied upon as evidence of want *of probable cause in *Dawson* v. *Vansandeau*, 11 W. [*51] R. 516 (1863), were rather peculiar. One Poole was being examined before one of the Aldermen of London on a charge of fraudulent bankruptcy. The plaintiff Dawson was the attorney defending Poole, and the defendant was the attorney conducting the prosecution. A witness, B., was called for the prosecution to prove that he had assisted in the removal of Poole's goods. In cross-examination he denied the truth of a written statement signed by him and produced by the plaintiff, and said the plaintiff had made it up. The defendant then gave the plaintiff into custody on a charge of conspiracy to defraud. This was made the subject of an action for false imprisonment, as to which

there was no defence.) The plaintiff was immediately searched, and there was found upon him a letter from Poole, whom he was defending, to him, suggesting that one W., who had helped B. to remove the goods should be sent away, and inclosing a receipt for money for that purpose which W. was to sign. The defendant then called W., who told the same story as B., and asserted that the proof which he had given to the plaintiff as a witness for Poole had been made up by the defendant. The defendant then preferred a charge of conspiracy against the plaintiff, who was remanded, and subsequently discharged. As far as appears from the report the whole of this episode was irregularly interpolated in the middle of the hearing of the charge against Poole. Upon proof of these facts, Blackburn, J., directed the jury that [* 52] there was no evidence of *reasonable and probable cause, because, assuming the plaintiff to have been guilty of the conspiracy, B. was his accomplice, and the letter from Poole was not discovered by the defendant until after the plaintiff was taken into custody. Cockburn, C. J., and Crompton and Blackburn, JJ., held that this was a misdirection, because the evidence of an accomplice, though not, generally speaking, enough by itself to procure a conviction, makes a *primâ facie* case which may possibly be reasonable cause for prosecuting; "and here the confirmatory evidence, though not discovered until after the plaintiff had been given into custody, was discovered before the criminal charge was preferred against him with a view to prosecution, and so was admissible as evidence of reasonable and probable cause for that prosecution."

In *Lister* v. *Perryman*, L. R. 4 H. L. 521; L. J. Ex. 177 (1870), the substantial part of the evidence was to the following effect: (*b*)—The defendant was informed by his coachman Hinton (1) that the plaintiff had some little time before expressed admiration for the defendant's gun, and said he should like to have it; (2) that he had been informed by one Robinson that the defendant's gun was in the plaintiff's barn; (3) that he and Robinson and the plaintiff had gone together to the plaintiff's barn, and the plaintiff had there produced another gun, and said that that was the gun which Robinson had seen in his possession;

(*b*) The action was for false imprisonment, but the law as to what is reasonable cause is the same in such actions as in actions for malicious prosecution.

but Robinson persisted that the gun he had *previously [*53] seen was the defendant's. There was contradictory evidence as to whether this was the whole of the information before the defendant; but the jury found as a fact that it was. Lord Chief Baron Kelly directed them that in that case they must find for the plaintiff, because the defendant had acted upon Hinton's account of what Robinson had said, when he might have inquired from Robinson himself whether he was sure the gun he had seen the plaintiff using was the defendant's. The Courts of Exchequer and Exchequer Chamber upheld this ruling; but the House of Lords ordered a new trial on the ground of misdirection. They held, in substance, that though the part of Hinton's communication to the defendant, which is here numbered (2), was hearsay, the parts numbered (1) and (3) were not hearsay, but statements at first hand as to what the plaintiff had said and done, and that therefore it did not follow from the defendant's omission to communicate personally with Robinson that he had no reasonable cause for the prosecution.

The nature of reasonable cause is discussed at considerable length by Hawkins, J., delivering the judgment of the Queen's Bench Division in *Hicks* v. *Faulkner*, 8 Q. B. D. 167; 46 L. T. 127; and 51 L. J. Q. B. D. 268 (1882). In this case the plaintiff was the son of the defendant's tenant. The defendant had taken proceedings against the plaintiff's father in the County Court for rent, in the course of which the plaintiff swore that he had given the defendant the key of the premises. The defendant prosecuted the plaintiff for perjury. At the trial of the action for malicious *prosecution the plaintiff swore that he had [*54] delivered the key. The defendant swore that he had not, and produced a diary and other evidence in corroboration of his assertion. Baron Huddleston directed the jury, in substance, (1) that if they thought the plaintiff had delivered the key, and that the defendant, when he prosecuted him, knew that he had done so, they should find for the plaintiff; (2) if they thought the plaintiff did not deliver the key, for the defendant; (3) if the plaintiff did deliver the key, but the defendant had forgotten all about it, and honestly believed that the plaintiff had committed perjury, for the defendant, because in that case the prosecution was not malicious, and was not without reasonable cause; (4) if they could not make up their minds, for the defendant, on the

ground that it was for the plaintiff to prove his case. The jury found generally for the defendant. A rule *nisi* having been obtained for a new trial, it was argued that (3) was a misdirection, because if the defendant was led to prosecute through a defect in his own memory he ought to take the consequences. The Divisional Court held, on the authority of *Lister* v. *Perryman* (*g*), that a prosecutor may, where it is reasonable to do so, rely on some one else's memory, whence they deduced that he may, *à fortiori*, rely on his own. Mr. Justice Hawkins defined the constituent circumstances of reasonable cause as follows:—

"(1) An honest belief of the accuser in the guilt of the accused:

[* 55] * "(2) Such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion:

"(3) Such secondly-mentioned belief must be based on reasonable grounds—such grounds as would lead any fairly cautious man in the defendant's situation so to believe:

"(4) The circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for believe in the guilt of the accused."

Whether the matter gains in clearness from being expressed with this degree of elaboration, I am not certain. But shortly, Mr. Justice Hawkin's view is, that having reasonable cause to prosecute means believing in the guilt of the accused because of being reasonably convinced of circumstances which afford reasonable ground for that belief.[1] Is this any clearer than the shorter statement, that having reasonable cause for prosecuting means believing honestly and reasonably that the prisoner was guilty? To take a simple illustration. A. sees B. shoot C. through the heart and prosecutes B. for murder. B. subsequently sues A. for malicious prosecution. The question whether A. had reasonable cause would be divided for determination into four, namely: Did A. honestly believe that B. murdered C.? Was A.'s belief that B.

(*g*) *Ante*, p. 52.

[1] The action cannot be maintained if the defendant had good reason to believe and did believe that the plaintiff had committed the offence charged: Fisher *v.* Forrester, 33 Pa. 501; Smith *v.* Ege, 52 Id. 419; Seibert *v.* Price, 5 W. & S. 438; Richter *v.* Koster, 45 Ind. 440 (1874); Murphy *v.* Martin, 58 Wis. 276 (1883), Cassoday, J.

was guilty of murder based on an honest conviction of the existence of the circumstance that he had seen B. kill C. without apparent justification? Was the fact that A., at the time of prosecuting, remembered having seen B. shoot C. through * the heart a reasonable ground for A.'s honest [* 56] conviction that he had seen B. kill C. without apparent justification? Was the circumstance that A. had seen B. kill C. without apparent justification a reasonable ground for believing in the guilt of B.? I am disposed to suggest that the last three of these questions are an unnecessarily amplified repetition of the first.

In *Abrath* v. *The North Eastern Railway Company*, 11 Q. B. D. 79; *ib.* (C. A.) 440; and (H. L.) 11 Ap. Cas. 247; and 52 L. J. Q. B. 352; *ib.* (C. A.) 620; and (H. L.) 55 L. J. Q. B. 457 (1883–5), which I shall have further occasion to discuss, the defendants, upon the original information of persons asserting themselves to have been the plaintiff's accomplices, and after making certain inquiries and taking legal advice, prosecuted the plaintiff for conspiring to defraud them. The jury found that the defendants took reasonable care to inform themselves of the true state of the case, and that they honestly believed the case which they laid before the magistrates. It was held in the Court of Appeal and the House of Lords that this verdict justified the judge in holding that want of reasonable cause was not proved, and entering the verdict and judgment for the defendants. It is worth noticing that the substantial decision of the House of Lords was that these questions, together with the further question whether the defendants were actuated by any indirect motive in preferring the charge (to which in *Abrath* v. *The North Eastern Railway Company* the jury gave no answer), were the proper questions to leave to the jury.

[* 57]

* CHAPTER VII.

REASONABLE CAUSE—A QUESTION FOR THE COURT OR FOR THE JURY?

The purpose of this chapter is to show, by an account of the decisions on the subject, how the universally acknowledged rule, that the question of reasonable cause is a question for the judge, has been gradually affected by successive judicial decisions until the practical burden of deciding whether or not the plaintiff has shown a want of reasonable cause has been in effect transferred to the jury.[1]

The doctrine that reasonable cause is a question of law finds implicit sanction in the case of *Pain* v. *Rochester and Whitfield*, Cro. Eliz. 871 (41 Eliz.). The action was for "conspiracy for procuring him falsely and maliciously to be indicted." The plea set out the circumstances whereby the defendants came to indict the plaintiff. The Court of Queen's Bench held, on demurrer,

[1] The leading American case on this subject, Munns *v.* Dupont, 3 Wash. C. C. 31-41, 1 Amer. Lead. Cas. 211 (1811), was one in which the plaintiff had been charged with stealing a brass pounder and three draughts of machinery and causing imprisonment; also for bringing a civil action and demanding excessive bail; also for an indictment as the receiver of five pieces of parchment knowing them to be stolen; all charged to have been done maliciously and without probable cause. The plaintiff suffered a non-suit because the defendants justified themselves. The charge of the court was by Mr. Justice Washington: "The rights of individuals are not to be lightly sported with, and he who invades them ought to take care that he acts from pure motives and with reasonable caution. If without probable cause he has inculpated another, and subjected him to injury in his person, character, or estate, it is fair to suspect the purity of his motives, and the jury are warranted in presuming malice. But, though malice should be proved, yet, if the accusation appear to have been founded upon probable ground of suspicion, he is excused by the law. Both malice and want of probable cause must be established against him.

"*What is probable cause?*—It is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. The malice is entirely within the province of the jury. Probable cause is a mixed question of law and fact: the circumstances sufficient to prove probable cause must be decided by the Court; but to the jury must be referred the matter whether those circumstances are proved by credible testimony."

that the plea was good, "for their causes of suspicion and absenting of himself [the plaintiff] after notice of the warrant are causes sufficient, and he [the defendant] need not show what evidence was given; and the imprisonment need not be answered, when the indictment is grounded upon good cause."

*A hundred and fifty years later was decided *Golding* [* 58] v. *Crowle*, Sayer's Rep. 1 (1751). It was an action for maliciously prosecuting for perjury. Denison, J., directed the jury that upon the evidence they ought to find for the defendant, but they found for the plaintiff. A rule for a new trial was made absolute.

"*And by the Court:* As the direction of the judge was in a matter of law, and was, in our opinion, very right, the present verdict, which is contrary thereto, ought not to stand. More was proved in this case on the part of the defendant than it was incumbent upon him to prove; for in the case of *Savill* v. *Roberts* it is laid down, that if a bill of indictment have been found a true bill, the defendant, in an action for maliciously prosecuting the indictment, shall not be obliged to prove a probable cause for preferring the bill. But it shall lie upon the plaintiff to prove express malice" (*a*).

The first appearance which I have been able to find of a tendency to transfer the question of reasonable cause from the judge to the jury is in the case of *Beckwith* v. *Philby*, 6 B. & C. 635 (1827), which was not a case of malicious prosecution, but of false imprisonment. In that case Littledale, J., told the jury that he should find that there was reasonable cause for the arrest and imprisonment if they "thought upon the * whole [* 59] case that the defendants had reasonable cause for suspecting the plaintiff of felony." The Court of King's Bench held this to be a right direction, and refused a rule for a new trial. This decision was followed in *Davis* v. *Russell*, 5 Bing. 354 (1839), where Gaselee, J., similarly directed the jury in an action for malicious prosecution. The Court of Common Pleas (Best, C. J., and Burrough and Gaselee, JJ.) held that this direction amounted to saying, "If you think the defendant acted *bonâ fide*,

(*a*) This appears to me to be an exaggeration. What Chief Justice Holt said, in *Savill* v. *Roberts*, was that in that particular case, if the grand jury had ignored the bill, the defendant would have been neither "imprisoned nor scandalized nor put to expense," and consequently would have suffered no damage, and could not have recovered. *Vide post*, p. 104.

I am of opinion that he had probable cause for the course he pursued," and was right. About the same time the cases of *Willans* v. *Taylor* were tried. The first trial took place in 1829 (6 Bing. 183). Tindal, C. J., nonsuited, and the Court made a rule absolute for a new trial, on the ground that there was enough evidence of want of reasonable cause to put it on the defendant to prove reasonable cause affirmatively. At the new trial, 2 B. & Ad. 845 (1831), upon evidence being given that on the trial of the indictment against the plaintiff the defendant was in Court, and was called, but did not give evidence, Tindal, C. J., told the jury that they must determine whether the defendant's motive for not appearing when called was that he had sworn falsely when he appeared before the grand jury in support of his bill, and was afraid to do so again ; that if that was his motive there was a want of reasonable cause for the prosecution, and if not there was reasonable cause. After a second verdict for the plaintiff, the Court of King's Bench held that this direction was right, for that [*60] it was a *question of fact what the defendant's motives were, and a question of law whether they gave him reasonable cause for prosecuting.

In *Eagar* v. *Dyott and Harman*, 5 C. & P. 5 (1831), it appeared that as regarded the defendant Dyott, the plaintiff, whom she had prosecuted for embezzlement, had received money on her account, and had denied to her that he had received it. Lord Tenterden thereupon held that "there was sufficient evidence of reasonable and probable cause," and nonsuited without taking a verdict on the facts.

In *Blachford* v. *Dod*, 2 B. & Ad. 179 (1831), Lord Tenterden also nonsuited. There, however, the facts were admitted on the pleadings. They were that the plaintiff, who was a solicitor, had written to the defendants demanding money, on behalf of a client and threatening criminal proceedings if it was not sent, and had subsequently taken out a summons against them for false pretences. They retorted by indicting him for demanding money with threats, and this was the prosecution complained of. The Court refused a rule for a new trial. It appears that the money originally demanded by the plaintiff was admitted in the pleadings not to have been in fact due, but I should doubt whether this was an essential part of the grounds of the nonsuit.

The case of *Venafra* v. *Johnson*, 10 Bing. 301 (1833), marks

a step in the practical transference of the question of reasonable cause from the judge to the jury. In this case the evidence was that the defendant had heard from his servant that the plaintiff had threatened * him, and had accordingly sworn [*61] before a justice that he believed his life to be in danger, whereupon the plaintiff was brought up on a warrant and held to bail. Park, J., considered that reasonable cause for the proceedings had been shown, and nonsuited. The Court (Tindal, C. J., Bosanquet, Alderson, and Park, JJ.), however held, on the authority of *Willans* v. *Taylor*, that it should have been left to the jury whether the defendant believed the charge he had made, and was really in fear of his life, or whether it was colourable only.

In *M'Donald* v. *Rooke*, 2 B. N. C. 217 (1835), the plaintiff, having been dismissed from the defendant's service, took away some of his goods. The defendant wrote to her that if she did not return them he would prosecute. The letter was lost, and the defendant, getting no answer, laid an information against the plaintiff, and caused her to be arrested on a warrant, but subsequently withdrew from the prosecution. Denman, C. J., left the case to the jury, who found for the plaintiff. The defendant moved for a rule on the ground that the judge ought himself to have decided whether there was a want of reasonable cause. The rule was refused, Park, J., observing, "Whenever the question of probable cause if a mixed question of law and fact, it may properly be left to the jury." If this were construed strictly it would, I suppose, include every case in which the facts are not admitted.

The doctrine that having or not having reasonable cause is a question of the defendant's state of mind is * the [* 62] method whereby the crucial question what conduct is reasonable has been practically transferred to the jury.[1] What

[1] Probable cause upon which to found a prosecution exists only where there is such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong persuasion that the person is guilty. No mere suspicion nor even a strong belief arising from the character of the accused, his habits or countenance can be admitted as a justification: Holburn *v.* Neal, 4 Dana, 120; Stier *v.* Labar, 16 W. N. C. 273 (1885), Trunkey, J.; Burlingame *v.* Id., 8 Cowen, 141; French *v.* Small, 4 Verm. 363; Hall *v.* Hawkins, 5 Humphreys, 357; Foashay *v.* Ferguson, 2 Denio, 617; Swain *v.* Stafford, 3 Ired. Law, 289; Merriman *v.* Mitchell, 13 Me. 439; Travis *v.* Smith, 1 Barr, 234; Winebiddle *v.* Porterfield, 9 Id. 137. On this subject some courts have fallen into error holding that probable cause

was a man's motive is clearly a question of fact, and it is but a step from requiring the jury to find what his motive was to requiring them to find whether it was reasonable. The doctrine that the question is one of motive is well illustrated in *Delegal* v. *Highley*, 3 B. N. C. 950 (1837). The first count of the declaration was for malicious prosecution, and the plea to it, which was a plea in justification, was argued on demurrer. The judgement of the Court, delivered by Tindal, C. J., describes it as setting out "the several facts and circumstances attending the transaction out of which the charge before the Lord Mayor arose. To this plea there is a special demurrer, alleging, as one ground of objection, that it contains no allegation that the defendant at the time he caused the charge to be made, had been informed of, or knew or in any manner acted on those facts or circumstances. [The plea alleged as follows:—"Wherefore the defendant had reasonable and probable cause to believe and did believe," but did not say that he believed at the time of prosecuting.] The gravamen of the declaration is, that the defendant laid the accusation without any reasonable and probable cause operating on his mind at the time," and "the defendant [the report says plaintiff] would have failed at the trial if he had not proved that the facts of the case had been communicated to him, or at all events, so much of the facts as would have been sufficient to induce [* 63] a belief of the plaintiff's guilt on * the mind of any reasonable man, previous to the charge being laid before the magistrate."

Panton v. *Williams*, 2 Q. B. 169 (1841) was an action for maliciously prosecuting for forgery. Lord Denman, who had a strong disposition, in cases of this character, to leave as much as possible to the jury, tried the case, and is said by Tindal, C. J., to have "directed the jury that in a case of that sort it was not a question of law but a question of fact whether there was reasonable and probable cause." This was held to have been a misdirection, and so no doubt it would be now, if it was put in that uncompromising fashion. Tindal, C. J., giving judgment in the

depends upon whether there was reasonable ground for prosecuting and not upon the prosecutors knowledge or belief: Mowry *v.* Miller, 3 Leigh. 561; Hickman *v.* Griffin, 6 Mo. 37; Adams *v.* Lesher, 3 Blackford, 241; Bell *v.* Pearey, 5 Ired. 83; Wills *v.* Noyes, 12 Pick. 324; Faris *v.* Starke, 3 B. Mon. 4. Others have held that it depended merely on belief and not on the grounds of belief: Chandler *v.* McPherson, 11 Ala. 916.

Exchequer Chamber, laid it down that even where the case is complicated the judge ought to tell the jury what facts, if proved, amount to reasonable cause, and what do not.

In *Michell* v. *Williams*, the plaintiff had been the defendant's tenant, with sporting rights. With the permission or at the instigation of the defendant's agent the plaintiff cut the dam of a fish-pond and took the fish. Disputes afterwards arising, the agent prosecuted the plaintiff under 7 & 8 Geo. 4, c. 30, for doing so. Wightman, J., asked the jury the three questions which follow:—"1. Whether Durance [the agent] acted under the authority of the defendant when he laid the information and prosecuted the proceedings against the plaintiff:"—Answer, yes. "2. Whether Durance gave permission to fish the pond in question by cutting down the bank:"—Answer, yes. "3. Whether the defendant, in taking these proceedings * against the plaintiff was actuated by evil feelings towards [* 64] him, and not by a *bonâ fide* and genuine belief that the plaintiff had committed the offence imputed to him:"—Answer, yes. Mr. Justice Wightman, thereupon, held that there was a want of reasonable cause, and required the jury to assess the damages. In support of a rule nisi for a new trial, it was argued that the judge ought also to have asked the jury whether the defendant knew that Durance had given the plaintiff leave to break the dam, but the Court of Exchequer held that the plaintiff had, upon the evidence and the answers of the jury, established a want of reasonable cause, and that it was, therefore, unnecessary to ask the question. This case appears to me to have been in strict accordance with the old rule, the jury finding nothing about the defendant's beliefs or state of mind, except that he was malicious, which would not have been enough if the judge had not found as a fact that there was a want of reasonable cause.

The application of this authority to the leading case of *Turner* v. *Ambler*, 10 Q. B. 252 (1847), of which an account is given in the preceding chapter (*b*), led to a statement of the law not very easy to understand. Lord Denman, who tried the case, found that there was no want of reasonable cause, although the jury had found that there was malice, and that after he had "left it to the jury to say whether the defendant had acted maliciously, and, with

(*b*) See *ante*, p. 47.

reference to that question, whether the evidence showed,
[* 65] in point of fact, such a * want of probable cause for the prosecution as amounted to proof that the defendant had instituted it from motives of malice." Judgment was ultimately entered for the defendant on the ground that the judge's finding that there was no want of reasonable cause, was right.

In *Haddrick* v. *Heslop*, 12 Q. B. 267 (1848), for the first time, as far as I know, the jury were expressly made the judges of the "reasonableness" of the defendant's conduct. Wightman, J., asked the jury whether the defendant believed that there was reasonable ground for indicting the plaintiff, and the jury found that he did not. They were also asked "whether he had indicted from malice," and answered "that they thought the word 'malice' was strong, but that they thought the defendant had indicted from an improper motive." Upon these findings the verdict was entered for the plaintiff, and a rule for a new trial for misdirection was refused. Lord Denman said, "It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause."

In *Douglas* v. *Corbet*, 6 E. & B. 511 (1856), Bramwell, B., asked the jury whether they thought the defendant had reasonable and probable cause for his belief that the plaintiff stole a sheep, for the larceny of which he indicted him. The jury found that he had, and the judge then held that under the circumstances there was reasonable cause for the prosecution. There was some evidence of malice, to the effect that the defendant prose-
[* 66] cuted in order to put a stop to an action in * the County Court. The Court of Queen's Bench (Coleridge and Crompton, JJ.; Erle, J., *diss.*) discharged a rule for a new trial.

In *Lister* v. *Perryman* (*c*), L. R. 4 H. L. 521; L. J. Ex. 177 (1870), the following observations on the respective provinces of judge and jury were made in the judgments delivered in the House of Lords. It will be remembered that the action was one for false imprisonment, but the question of reasonable cause is subject to the same rules in that action as in actions for malicious prosecution.

"The Lord Chancellor (Lord Hatherley): . . . . I certainly do concur in one of the observations made by the learned counsel

(*c*) *Vide ante*, p. 52.

during the course of his argument—that it is, on the whole, somewhat to be regretted that this question of reasonable and probable cause should not be left to the jury, who heard the evidence and saw the demeanour of the witnesses, and who would, therefore, be in a good position to judge what degree of trust it was reasonable and proper that the person to whom this information was given should repose in his informant. I should have been glad if the duty of deciding this question had not been left to those who have not the same intimate knowledge of the matter which was possessed by persons who heard the whole cause, and were, therefore, in a better position for estimating the amount of credit due, both to the original prosecutor and to the persons who may have been his informants.

* "Lord Chelmsford: (*d*)—My Lords, there can be [* 67] no doubt, since the case of *Panton* v. *Williams* (*e*), in which this question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury.

"Lord Westbury: (*f*)—My Lords, I have very few words to add. The existence of 'reasonable and probable cause' is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be that it is an inference to be drawn by the judge, and not by the jury. I think it ought to be the other way.

"Lord Colonsay: (*f*)—My Lords, I have listened to this case with much interest, finding myself placed in what is to me the somewhat novel position of having to deal with the question of want of reasonable and probable cause as a question of law for the Court, and not a question of fact for the jury. I have fre-

(*d*) At p. 535.
(*e*) 2 Q. B. 169.
(*f*) At p. 538.

[* 68] quently * had to deal with cases of this kind in the other end of the island; but there this question of want of reasonable and probable cause is treated as an inference in fact to be deduced by the jury from the whole circumstances of the case, in like manner as the question of malice is left to the jury."

This is the last case in which it is laid down without reserve that the question, whether the defendant's behaviour was "reasonable," must be decided by the judge. The two following cases show how judicial ingenuity has devised a method whereby the wishes unanimously expressed in the judgments of the House of Lords in *Lister* v. *Perryman* have been practically gratified.

The case of *Hicks* v. *Faulkner*, 8 Q. B. D. 167, and 51 L. J. Q. B. 268 (1882), has been treated of at some length in the preceding chapter. The question of reasonable cause is divided, in the judgment delivered in the Divisional Court by Hawkins, J., into four parts, namely:—

1. An honest belief of the accuser in the guilt of the accused;
2. Such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion;
3. Such secondly-mentioned belief must be based upon reasonable grounds—that is, such grounds as would lead any fairly cautious man in the defendant's situation so to believe;

[* 69] *4. The circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.

The judgment proceeds: "The belief of the accuser in the guilt of the accused [No. 1], his belief in the existence of the facts on which he acted [No. 2], and the reasonableness of such last mentioned belief [No. 3], are questions of fact for the jury, whose findings upon them become so many facts, from which the judge is to draw the inference, and determine whether they do or do not amount to reasonable and probable cause. This, also, is an inference of fact, not of law, as is sometimes erroneously supposed; and the judge is to draw it from all the circumstances of the case" *Lister* v. *Perryman*, *per* Lords Chelmsford and Westbury.

If reasonable cause consists of Nos. 1, 2, 3, and 4, and Nos. 1, 2, and 3 are for the jury, nothing is left for the judge except No. 4. I cannot, as I have stated already (*g*), understand what meaning No. 4 can have except what has already been included in Nos. 1, 2, and 3. I must, therefore, admit that I cannot imagine a case in which the jury would find everything that Mr. Justice Hawkins would leave to them in favour of the plaintiff, and the judge would hold that there was no want of probable cause, unless the judge and jury took directly opposite views of the case.

The importance of *Hicks* v. *Faulkner* was greatly * dimin- [* 70] ished by the decision, about the same time, of *Abrath* v. *N. E. Rail. Co.*, 11 Q. B. D. 79; *ib.* (C. A.) 440; and (H. L.) 11 App. Cas. 247; and 52 L. J. Q. B. 352; *ib.* (C. A. 620; and (H. L.) 52 L. J. Q. B. 457 (1883–5), which appears to me to establish definitely the boundary between the provinces of the judge and the jury as to reasonable cause, as well as determining some other points previously more or less in dispute as to the law of actions for malicious prosecution.

The action was tried at Durham Summer Assizes, 1882, before Mr. Justice Cave. The following is the statement of the facts set out in the report of the hearing in the Court of Appeal (11 Q. B. D. 441):—

"On the 10th of September, 1880, a collision occurred at Ferry Hill Station, on the defendants' railway, and one M. McMann alleged that he had thereby sustained injuries. McMann was attended by the plaintiff, G. A. Abrath, a doctor of medicine and surgery, and McMann brought an action against the defendant to recover damages. The action by McMann stood for trial at the Northumberland Summer Assizes, 1881; but it was settled by the defendants paying to the plaintiff McMann 725*l.* damages and 300*l.* costs. After the settlement, the directors of the defendants' company received certain information from Rayne, a surgeon, who was the medical adviser of the railway company in reference to accidents, and who was authorised to employ detectives on behalf of the company. The directors thereupon employed a solicitor named Dix to see certain persons and take their statements. Some of these * person were relatives of Mc- [* 71] Mann, and others were well acquainted with him, and

(*g*) *Vide ante*, p. 55.

their statements, if true, showed that a fraud had been perpetrated on the defendants; that McMann had not been seriously injured in the collision; that the injuries of which McMann had complained had been wilfully produced by the present plaintiff, Dr. Abrath, with the consent of McMann, for the purpose of getting money from the defendants. These statements were submitted to the directors of the defendants' company, who thereupon ordered that the opinion of counsel should be taken, and counsel advised that there was a good case for prosecuting a charge of conspiracy against McMann and Abrath, his medical adviser. Two eminent medical men were of opinion that the case of the alleged injuries to McMann was an imposture. Thereupon the defendants caused an information to be laid before justices against the plaintiff, Dr. Abrath, on a charge of conspiracy to cheat and defraud the defendants. He was committed for trial and was tried in January, 1882, and acquitted . . . He thereupon commenced the present action, and at the trial certain witnesses were called who were acquainted with McMann, and gave evidence to show that his injuries were real and not feigned, and these witnesses had not been seen on behalf of the defendants before they instituted proceedings against the plaintiff. It was also shown that the persons on whose statements the directors had ordered the prosecution to be instituted against the plaintiff were of bad character, and one of them had been convicted several [*72] times, and also their *own statements, if true, established that they were accomplices with the plaintiff and McMann in the conspiracy. For the defendants it was not disputed that the plaintiff was innocent of the conspiracy; but it was contended that they were justified in instituting the prosecution upon the faith of the statements laid before the directors."

These being the principal facts, Cave, J., addressed the jury, in the course of his summing up, as follows:—

"I think the material thing for you to examine about is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence,

nevertheless they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then there is another point, and that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before * magistrates with a case which appears to be [* 73] good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore, I shall have to ask you that question along with the others, and according as you find one way or the other, then I shall tell you presently, or I shall direct you, whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices, then I shall tell you, in point of law, that this amounts to reasonable and probable cause; and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion—if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the facts which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question, Were they in what they did actuated by malice—that is to say, were they actuated by some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law to justice? If you come to the conclusion that they did honestly believe that, then they are entitled, again, to your verdict; but * if you come to the [* 74] conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict; and then it will become

necessary to consider the question of damages." The learned judge, after commenting upon the evidence, proceeded: "Now, gentlemen, these are the circumstances which, I think, point to the question of reasonable care having been taken: Did they take, or did they not take, reasonable care in informing themselves of the true facts of the case? As I have said just now, the plaintiff has to satisfy you that they did not; if you are satisfied that they did, you ought to answer that question in favour of the defendants. If, however, you are satisfied that they did not take reasonable care, then you must answer it for the plaintiff." In conclusion, Mr. Justice Cave left three questions to the jury. These were:—

First, did the defendants take reasonable care to inform themselves of the true state of the case?

Secondly, did they honestly believe the case which they laid before the magistrates?

Mr. Justice Cave directed the jury that if they answered both these questions in the affirmative, that would be a verdict for the defendants; but that if they answered one or both in the negative, they must answer the third question—"Were the defendants actuated by any indirect motive in preferring the [*75] charge?" and *that if they answered either or both of the first two in the negative, and the third in the affirmative, the verdict would be for the plaintiff, and they must assess the damages. They answered the first two questions in the affirmative; Mr. Justice Cave held that this amounted to a verdict for the defendants, and gave judgment for the defendants accordingly.

I maintain that this came practically to the same thing as leaving to the jury the two questions whether there was reasonable cause, and whether there was malice. Mr. Justice Cave expressly said that if the jury found that the defendants did not take reasonable means to inform themselves of the true facts of the case, and acted maliciously, that would be a verdict for the plaintiff. He did not himself decide upon the evidence that no want of reasonable cause was shown, as, if I may respectfully say so, the judges used to in the earlier cases, and did in *Lister* v. *Perryman*. He accepted the decision of the jury that the means of informing

themselves adopted by the defendants were reasonable, and I cannot doubt that he would equally have accepted it if it had been the other way. Can any one imagine a case in which a judge, after leaving to the jury the questions left in this case, and being informed that in their opinion the means of informing himself adopted by the defendant were not reasonable, or that the defendant did not honestly believe in his case, would hold that no want of reasonable cause had been shown, or *vice versâ*? The great importance of Mr. Justice Cave's summing up, and the questions that he left to the jury, * consists in the fact that [*76] they are practically applicable to every action for malicious prosecution, and that the Court of Appeal and the House of Lords decided in effect that the summing up was good law, and that the questions left to the jury were the right questions to leave to them.

I may add that, through the kindness of my friend Mr. MacClymont, I have had an opportunity of reading the short-hand report of the summing up, which was included in the printed case used in the appeal to the House of Lords. It contains simple examples, suggested by the judge, of what obviously would, and what obviously would not, be reasonable means of informing himself as to the true facts of the case adopted by the prosecutor, and it expressly asserts, again and again, that the question whether the means of informing themselves in this case adopted by the defendants were reasonable or otherwise, is the principal question which the jury have to decide.

After judgment for the defendants at the trial the plaintiff obtained a rule in the Divisional Court for a new trial on the ground of misdirection. After argument (11 Q. B. D. 79) the rule was made absolute by Grove and Lopes, JJ., on the ground of misdirection as to the burden of proof, a question which is discussed in a subsequent chapter (*h*). The defendants appealed to the Court of Appeal (11 Q. B. D. 440), where the judgment of the Divisional Court was reversed, and that of Mr. Justice Cave restored. As in the Divisional Court, the * question principally argued was that of the burden of proof; but the [*77] judgments incidentally contain the proposition that the questions which Cave, J., left to the jury were proper questions to leave to them. At the hearing of this appeal it was ordered by the Court,

(*h*) *Vide post*, p. 104.

with the consent of the parties, "that the plaintiff should be at liberty to appeal from the judgment of Mr. Justice Cave, and to raise the questions whether there was reasonable and probable cause for instituting the prosecution, and whether the judgment had been rightly entered by Cave, J., on the findings of the jury." Lord Esher, M. R., said (at p. 451): " . . if the direction of Cave, J., to the jury was simply that it was a necessary part of the question whether there was a want of reasonable and probable cause for instituting the prosecution against the plaintiff, that it should be decided whether reasonable care had been taken by the defendants to inform themselves of the true state of the case, and that the burden of proving that minor proposition, as well as the whole proposition, lay upon the plaintiff, it is a direction which cannot be impeached." In direct reference to the plaintiff's appeal against the judgment, the Master of the Rolls summarized the evidence in a few lines, and said that upon that, and upon the findings of the jury that the defendants had taken reasonable means to inform themselves of the true state of the case, and had honestly believed the case they laid before the magistrates, he was satisfied that no want of reasonable cause had been proved.

[* 78] * The substance of the judgments in the House of Lords appears to me, as I have already stated, to be that the case was rightly left to the jury. In order to support this contention I reproduce here the whole of the judgments as reported, except the greater part of Lord Bramwell's, which consists of an elaborate declaration that a corporation cannot be guilty of malice—a subject dealt with in a subsequent chapter (*i*) —and the first paragraph of Lord Fitzgerald's, in which his lordship refers to the same topic:—(11 App. Cas. at p. 249).

. "Earl of Selborne:—My Lords, the argument of the learned counsel for the appellant has cleared up any difficulty which there might have been as to the real grounds on which we should decide this case. The question is really one of the weight of evidence, and nothing else. The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff. It is not now seriously disputed that it does.

"The learned judge having left two questions of fact to the jury, they found, first, that proper care had been used by the

(*i*) *Vide post* p. 91.

prosecutors to inform themselves of the facts; and secondly, that the prosecutors honestly believed the case which they laid before the magistrates.

"In my judgment the learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law, and the only question is, is there any ground for saying that upon the weight of evidence the jury miscarried, and that a new trial ought to be directed? Speaking for myself, I cannot imagine a more * hopeless case in that point of view. [* 79] The railway company had to determine whether or not they would institute this prosecution; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be.

"The statements of certain persons were obtained, carefully considered, and laid before counsel, and counsel advised a prosecution upon those materials.[1] A prosecution having been instituted, it was thought by the magistrates that the preponderance of evidence was such that they ought to send the case for trial. Taking the evidence as it was presented to the railway company, to those who advised them, and to the magistrates, it was a body of evidence which, if believed, tended to prove the charge, and justified those who believed it in making the charge in perfect good faith. How it can be said that taking such a body of evidence as that, without the suggestion, much less proof, of the use of any fraudulent or improper means to obtain it, shows a want of reasonable care on the part of the company to inform themselves about the facts, I cannot imagine. I cannot conceive better *primâ facie* evidence of care in that respect."

[His Lordship than discussed the evidence in detail and concluded thus.—]

"So far from thinking that there is a preponderance of * evidence against reasonable and probable cause, my [* 80] doubt is rather on the other side, whether, on the whole evidence, there was really anything to go to the jury in favour of that conclusion. I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

[1] As to the defence of submitting a case to counsel, see note to page 43.

"Lord Watson:—My Lords, I am of the same opinion. I have no doubt that the learned judge rightly directed the jury, and that there is nothing to show that the defendants acted without reasonable or probable cause. The authorities cited by Mr. MacClymont in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them establish that a slight amount of evidence may be enough to launch the plaintiff's case, when the whole circumstances of the case are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor, but that is not the case here.

"As to the finding of the jury being contrary to the evidence, I concur in the observations which have been made by the noble and learned Earl. I entertain considerable doubt whether there was any evidence to go to the jury. It is unnecessary to determine that point; but of this I feel persuaded from the argument which we have heard, that looking at the evidence which was before the jury, they could not honestly and fairly have given any other verdict.

"Lord Bramwell:— . . . . . .

But assuming that that difficulty [the question whether [* 81] * the action lies against a corporation] did not exist, there is no absence of reasonable and probable cause in this case. I doubt very much whether Cave, J., need have left to the jury the question whether reasonable care had been used. I doubt it very much indeed. I doubt very much whether he might not—I will not say ought not—have said to the jury, 'If you are of opinion that these directors honestly believed the statements that were laid before them, and honestly acted upon the opinions that were given to them, there was not only no absence of reasonable and probable cause, but it existed in abundance.' However, he did put the question, and the jury did answer it; and it does seem to me, I must say, to be one of the strongest cases of an unfounded action that was ever brought, even for malicious prosecution.

"Lord Fitzgerald:— . . . . . .

To deal with the case as it really comes before us, I do not entertain any doubt that the issue upon the question of probable cause, as well as upon the question of malice, lies upon the plaintiff in this sense. that the plaintiff is bound to offer evidence sufficient,

if uncontradicted, to sustain both these issues on his behalf. At the close of the plaintiff's case, supposing it had closed there, and no evidence had been offered directly on behalf of the defendants, was there such a case upon the two issues as that it could be said that there was evidence to sustain the issues for the plaintiff? I so far differ from the opinion of my noble and learned friend that I think there was evidence upon both issues if uncontroverted, * from which the jury might have found, [* 82] and the judge who presided, drawing the proper inference from the facts himself might have found, in the plaintiff's favour It is unnecessary for me to point out in detail what that evidence was. But upon the whole of the evidence produced on both sides the learned judge put two questions—and, in my opinion, two very proper questions—to the jury for the purpose of informing his mind as to what was the proper inference for the judge to draw upon this very question of the presence or absence of reasonable cause.

"The jury answered the two questions in the defendant's favour; and though possibly I myself might have come to a different conclusion upon the first question, I cannot say that the verdict was an unreasonable one, or so far against the weight of evidence that it ought not to stand.

"As to the alleged misdirection, I do not think that the summing up of the learned judge, taken as a whole, and together with the questions he put, could have misled the jury."

I can put no other construction upon the whole of the judgments in this case than that every judge who tries an action for malicious prosecution is entitled—to put it at the lowest—to sum up in the sense of the passages quoted above from the summing up of Mr. Justice Cave, and to put to the jury the two questions which Mr. Justice Cave devised, namely—

1. Did the defendant take reasonable care to inform himself of the true state of the case?

* 2. Did he honestly believe the case he laid before [* 83] [whatever the tribunal may have been]?

These two seem to me to cover the whole ground of reasonable cause. If the jury answer them both "yes," the judge will be justified in holding that want of reasonable cause has not been proved. If the jury answer either question "no," the judge will be justified in holding that it has.

Some judges have already availed themselves of this precedent. I do not see why it should not become invariable, except in cases where the judge prefers to decide the question of reasonable cause for himself in the old-fashioned way.

* CHAPTER VIII. [* 84]

MALICE A QUESTION FOR THE JURY.

THERE has never been any doubt that the question whether a prosecution was malicious is one solely for the jury.[1] In *Mitchell* v. *Jenkins*, 5 B. & Ad. 588 (1833), which was an action for malicious arrest, Taunton, J., directed the jury that there the defendant's conduct amounted to malice in law, and that they must find for the plaintiff. The Court of King's Bench held this to have been a misdirection, as the question of malice was one altogether for the jury. Parke, J., observed that the jury, when directed that there was no reasonable cause, might infer from that that there was malice. The rule is so well ascertained that it is not necessary to multiply authorities, but see Chapter V., on Evidence of Malice.

[1] The question of malice is for the jury: Schofield *v.* Ferrars, 11 Wr. (Pa.) 195 (1864), Strong, J.; Boyd *v.* Cross, 35 Md. 194 (1871); Stewart *v.* Soneborn, 8 Otto, 187–202 (1878), Strong, J.

[*85]

*CHAPTER IX.

WHO ARE LIABLE TO BE SUED.

THE old action of conspiracy could not be brought against one person only (22 As. 77 (1304). This was one of the reasons for the introduction of the action on the case, which was the early form of the action for malicious prosecution. It lay, as an action now lies, against any private prosecutor, with a few simple exceptions. I know of no instance in which any person has been sued for a prosecution ordered by any officer of state, and I doubt if such an action would lie. Prosecutions may be directed by a Secretary of State, the Attorney-General, or the Director of Public Prosecutions, and I know of no direct authority as to whether or not an action for malicious prosecution would lie against any of these officers for what they had done in their official capacities.

No action lies against a grand juror for finding a bill (22 As. 77 (1304); *Floyd* v. *Barker* (*a*), 6 Rep. XII. 23 (1608), nor against a judge or justice of the peace for anything done openly in Court, or for anything done out of Court in the discharge of his duty (*Floyd* v. *Barker*, *sup.*). In *Girlinton* v. *Pitfield*, 1 Vent. 47 (1669), it was proved that the defendant was a justice [*86] of the *peace who had "procured some as witnesses to appear against the plaintiff, and his own name was endorsed on the indictment to give evidence." The Court of King's Bench held that the action did not lie, because the defendant, as a justice, was bound to cause any evidence that he knew of to be given.

It seems probable that no action for malicious prosecution will lie against an officer in the naval or military service of the Crown for what he does abroad in time of war, or at the suit of any other person in such service for anything done by him as such officer when both are subject to the articles of war. *Barwis* v. *Keppel*,

(*a*) This case was decided in the Star Chamber, temp. Jac. I.

2 Wils. 314 (1766); *Johnstone* v. *Sutton*, 1 T. R. 493 and 510 (1786): See also *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; and 39 L. J. Q. B. 53 (1869), and the cases there cited.

It is doubtful whether a corporation aggregate can be sued for malicious prosecution.[1] There is authority both ways, but not much of it, the question having been argued and determined once only, by Mr. Justice Fry on further consideration (*b*). This is also the only occasion that I am aware of in which damages have been recovered against a corporation for this wrong. An account of the decisions bearing on the point follows. It may be observed that no difficulty arises about false imprisonment, as that tort includes a trespass.

In *Stevens* v. *The Midland Counties Rail. Co.*, 10 Exch. 352 (1854), a man in the employ of the company had *prosecuted the plaintiff without their orders, and the [*87] plaintiff had obtained a verdict for 100*l.* against both the company and their servant. As against the company the Court of Exchequer set aside the verdict. Alderson, B., said: "It seems to me that an action of this kind does not lie against a corporation aggregate; for in order to support the action, it must be shown that the defendant was actuated by a motive in his mind,

(*b*) Edwards *v.* M. Rail. Co., 6 Q. B. D. 287; *Vide post*, p. 88.

[1] As in the case of deceit and for a similar reason, it has been doubted if an action will lie against a corporation for malicious prosecution.

A recent English case rules that if the wrongful act was done by a servant of the corporation in the course of his employment in the company's interest, such an action will lie: Edwards *v.* R. R. Co., 6 Q. B. D. Fr. 7 J. (1880).

The recent opinion of Lord Bramwell in Abrath *v.* N. E. R. Co., as pointed out by his learned colleagues was extra-judicial: (Lord Fitzgerald, 11 App. Cas. 244, and Lord Selborne at 256.)

In the American Law, it is universally held that case for malicious prosecution will lie against a corporation: Goodspeed *v.* Bank, 22 Conn. 530; Fenton *v.* Machine Co., 9 Phila. (Pa.). 189; Williams *v.* Ins. Co., 57 Miss. 759; Wheless *v.* Bank, 1 Bax. (Tenn.) 469; Bank *v.* Bank, 4 Mo. App. 505; Vance *v.* R. R. Co., 32 N. J. Law 334; Copley *v.* Grover, 2 Woods, 494 (1875), Bruce, J.; Ricord *v.* R. R. Co., 15 Nev. 167; Reed *v.* Bank, 130 Mass. 443; Morton *v.* Ins. Co., 34 Hun. 366; Hussey *v.* Norfolk R. R. 98 N. C. 34 (1887), Davis, J.; Williams *v.* Ins. Co., 34 Amer. Rep. 494 and note; Krulevitz *v.* R. R. Co., 5 N. E. Rep. 500; R. R. Co. *v.* Quigley, 21 How. 202 (1858); Hillard on Torts, 322.

Two cases may be found in our report books subsequently overruled holding that the action will not lie against a corporation because it cannot be guilty of a malicious intent: Gillett *v.* R. R. Co., 55 Mo. 315; overruled by Boogher *v.* Assn., 75 Mo. 319, and Owsley *v.* R. R. Co., 37 Ala. 560, expressly overruled by Jordon *v.* R. R. Co., 74 Ala. 85 (1883), Brickell, C. J.

As to the liability of a municipal corporation: Brown *v.* City, 90 Mo. 377 (1886), Ray, J.

As to liability of a corporation for torts see the able note to Hussey *v.* R. R., 2 Amer. St. Rep. 317; R. R. Co. *v.* Harris, 122 U. S. 597 (1887).

and a corporation has no mind." Platt and Martin, BB., both thought that there was no evidence of a prosecution by the company, but both expressly declined to give any opinion as to whether such an action could be maintained against a corporation.

Walker v. *S. E. Rail. Co.*, L. R. 5 C. P. 640; 39 L. J. C. P. 346 (1870), was an action against a railway company for false imprisonment and malicious prosecution. The Court of Common Pleas held that there was reasonable cause for the prosecution, and no point was raised as to whether the action lay.

The Bank of New South Wales v. *Owston*, 4 Ap. Cas. 270 (1879), was an appeal by the defendant company to the Privy Council. The action was for a malicious prosecution, alleged to have been instituted by the acting manager of the bank. The judge told the jury "that it was to be inferred, from Mr. Wilkinson's position as manager, that he had sufficient power under the circumstances for directing a prosecution." The colonial Court discharged a rule for a new trial, obtained on the ground, among others, that this was a misdirection. The Judicial Com-
[* 88] mittee made the rule absolute, * after some hesitation as to whether they would not nonsuit, because it appeared to them, from all the evidence, that instituting prosecutions was outside the scope of the acting manager's employment, and that there were no circumstances of instant urgency, such as might give him authority. The question whether the action lay does not appear to have been raised.

In *Edwards* v. *The Midland Rail. Co.*, 6 Q. B. D. 287; 50 L. J. Q. B. 281 (1880), the action was tried at the Stafford Assizes before Fry, J., the facts being that a detective in the the employment of the defendant company had prosecuted the plaintiff for theft. Fry, J., upon a verdict for the plaintiff, reserved two questions for further consideration,—1st, whether an action for malicious prosecution lay against a corporation, and 2d whether the employment of police was an act within the scope of the company's incorporation. The judgment was as follows:—

"I am asked to decide this question, as it were, by way of rehearsal, as it is intended to carry it to a higher tribunal. [Unfortunately this intention does not seem to have been carried into effect.] I must therefore express my opinion upon it. The question is, whether a railway company can be made liable in an action

for malicious prosecution. The malice, in order to found such an action, need not be express malice; but it may be implied from the wrongful action without just cause or excuse. Now it is a maxim that a corporation has no mind, no *mens rea*, therefore they cannot be guilty of malice. Can they, therefore, escape the consequences * of an action which in the [*89] case of an ordinary person would be held to imply malice? Mr. Hill suggests to me the case of partners who would be held to be individually liable for an action maliciously instituted by the partnership, and the subsequent incorporation of the partnership into a company. Can it be said that the company, consisting of the same persons as before, is not to be made liable for the same wrongful action? It would be strange if it were so, though I must not forget that the individuals who directed such a wrongful action on the part of the company would be personally liable (*c*).

"Those who deny that the company can be made liable rely principally on Baron Alderson's judgment in *Stevens* v. *Midland Counties Rail. Co.* (*d*), where he held that in order to support such an action it must be shown that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons Platt and Martin, did not agree (*e*) with Baron Alderson's reasons, but decided in the company's favour on other grounds,

"Has Baron Alderson's opinion, which in that case stands alone, been followd by other judges? In *Rex* v. *City of London*, which is cited in a note to *Whitfield* v. *South Eastern Rail Co.* (E. B. & E. 122), it was held * on demurrer [*90] that an action would lie against the Corporation of the City of London for maliciously publishing a libel; and though that decision is not of the greatest weight, being affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice Saunders, an able and experienced judge. In *Yarborough* v. *Bank of England* (16 East, 6), Lord Ellenborough referred to an earlier case of *Argent* v. *Dean and Chapter*

(*c*) This does not read like a considered judgment. Surely it would be not only strange, but contrary to every principle of law, if a company, sued as such, were to be held liable, in the absence of contract, for a wrong committed by some one else before it was in existence.

(*d*) 10 Ex. 352; *vide ante*, p. 87.

(*e*) This is strictly accurate. They did not disagree.

of St. Paul's (16 East, 7, n.), and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again, in *Whitfield* v. *South Eastern Rail Co.* (E. B. & E. 121), Lord Campbell says that 'the ground on which it is contended that an action for libel cannot possibly be maintained against a corporation aggregate fails,' and 'considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation.' In *Green* v. *London General Omnibus Co.* (7 C. B. N. S. 290, at p. 301), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice Erle says,

'The ground of the demurrer is, that the declaration [* 91] charges a wilful and intentional wrong, and that the * defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie.' In the case before me, it is similarly argued that a corporation cannot act maliciously or intentionally, because malice and intention imply mind. Chief Justice Erle continues, 'The doctrine relied on, that a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial.' In other words, the *ratio decidendi* of Baron Alderson was in this case disregarded; and as his decision has not been followed in English Courts, I am at liberty to decide in conformity with the later decisions; and I hold, therefore that the action will lie in this case.

"The next question is, was this act done within the scope of the incorporation of the company ? I hold that it was; the company may restrain the commission of crime on their railways; and the observations made in *Goff* v. *Great Northern Rail. Co.* (30 L. J. Q. B. 152) show that a company so acting may be responsible for an illegal arrest; I give judgment, therefore, for the plaintiff, with costs."

In *Abrath* v. *The North Eastern Rail. Co.*, 11 Ap. Cas. 247 (1886), the question was not argued, but the judgment delivered by Lord Bramwell was almost wholly devoted to it. I therefore

reproduce it here, all except the concluding paragraph, which dealt with the other aspects of the case (*f*).

"(*g*) My lords, I am of opinion that no action for a * malicious prosecution will lie against a corporation. I [*92] take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for a malicious prosecution it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the whole body of shareholders were to meet, and in so many words to say, 'prosecute so-and-so, not because we believe him to be guilty, but because it will be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors, even, by resolution at their board or by order under the common seal of the company, (I am putting the case plainly, in order that there may be no mistake about it,) were maliciously, with a view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive, no action would lie against the corporation, because the act on the part of the directors would be *ultra vires*; they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution.

"I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very * share- [*93] holders directing it, or the very directors ordering it, because it is impossible that a corporation can have either malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive. In the case which I put, an action would lie against the directors personally who had ordered an improper prosecution. It may be that no action would lie against any subordinate who had malice and who had not ordered or caused or procured the prosecution; because, although the two ingredients

(*f*) *Vide ante*, p. 80.
(*g*) 11 Ap. Cas. at p. 250.

existed which are necessary for the maintenance of such an action, that is to say, malice and the absence of reasonable and probable cause, yet in the case which I surmise the man would not be a prosecutor; and unless you find the absence of reasonable and probable cause and malice in him who is the prosecutor, an action is not maintainable. It is not enough, therefore, to show that there was an absence of reasonable and probable cause, and that the subordinate had malice; not that I for a moment suggest that that is the case here.

"In my opinion, this is not merely what is called a technical point—although if a point were untechnical it would be very objectionable. This is substantial objection; because every one, or every counsel and solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort is, that a jury would be more likely to give a verdict against a company than against an individual. Everybody [* 94] knows it, and perhaps there is a sort of hope of *confusion; it is said, 'The man was innocent; somebody ought to be punished for it; here is a railway company; there was an improper motive;' and so there is a jumble; the case gets before a jury, and a railway company is exactly the party to have damages awarded against it. If ever there was a necessity for protecting persons it is in an action for malicious prosecution, and for two reasons. First of all, the prosecutor is a very useful person to the community. We have something in the nature of a public prosecutor, but everybody knows that the greater number of prosecutions in this country are undertaken not by the State but by private persons, or, as in this case, corporations.

"One may venture to quote Bentham, even upon this matter. He said that laws would be of very little use if there was no informers, and that it is necessary, for the benefit of the public, that people when they prosecute, and prosecute duly, should be protected. And there is an additional reason. A man brings an action for a malicious prosecution; he gives evidence which shows, or goes to show, that he is innocent. You may tell the jury over and over again that that is not the question, but they never or very rarely, can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is, therefore, all-important that these actions should not be permitted to be

brought against persons or bodies or others who are not properly liable in respect of them.

"It may be said, 'Well, but this is rather hard upon *a man who has been prosecuted and improperly prose- [* 95] cuted.' That is to say, the corporation is innocent, but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information; he prosecutes upon that information. The person who gave him the information is not liable, because he did not prosecute. He may be liable for the untrue statement, because it may be slander, in the same way as he would be liable if he charged an indictable offence against a person; or possibly he may be liable for having procured the prosecution; and it may be that in such a case as this some of the people employed by the company were actuated by an indirect motive. I do not say they were—it is impossible to say so—but what I say is, that it is no harder upon a man that he has no remedy against a public company who has prosecuted him, when the servants of the company have been malicious, than it is that there is no remedy against any individual man who has prosecuted, he having no malice, but somebody who gave him information having malice.

"It is said that this is an old-fashioned sort of notion. It is; but this opinion is one that I have entertained ever since I have known anything about the law; and though it is an old-fashioned one, I trust that it is one which will not die out, for the reasons which I have given. But it is said 'But a variety of actions have been allowed against corporations which did not formerly exist.' I deny it. It is certain that a corporation may *order [* 96] a thing to be done which is a trespass, because there the act of those who act for the corporation is not *ultra vires*. For instance, take the case of false imprisonment. A railway company gives somebody power to take up persons who it believes are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority maliciously to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given makes a mistake and takes up a person who is not cheating, it may in such a case be said properly to be the act of the company, and they are properly liable. But in that case there is neither malice nor mo-

tive in question. So also they may be liable for the publication of a libel. That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore, the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper, or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the [* 97] corporation, in order to see whether it * should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will, or motive (*h*).

"For these reasons, which I dwell upon at no greater length, more particularly as Mr. MacClymont did not cite any cases upon this point, or go into it at all, I am clearly of opinion that this action does not lie against this company."

At the conclusion of the judgments, Lord Selborne, referring to the question whether a corporation can be answerable for malicious prosecution, said: "The importance of that question would certainly have led me, before I could arrive satisfactorily at an opinion of my own upon it, to desire to hear it argued. It has not been argued at your lordships' bar . . . I do not think that your lordships' decision in the present case can properly be regarded as determining that question."

It seems, upon the whole, indisputable that the question is still open, which, considering the importance and prevalence of corporate commercial undertakings, is rather remarkable.

An action for malicious prosecution lies against a person who is bound over to prosecute, although a judge or magistrate ordered the prosecution and bound the defendant over to prosecute of his own motion. *Fitzjohn* v. *Mackinder*, 9 C. B. [* 98] N. S. 505; and 30 L. J. C. P. * 257 (1861). As to this, however, see Chapter II. The case of *Fitzjohn* v. *Mac-*

(*h*) It seems to follow from this that, in Lord Bramwell's opinion, a corporation could not, under any circumstances, be held liable for a libel published by them on a privileged occasion. I am not aware that the point has ever been raised.

kinder appears to me to conflict in some degree with the old case of *Chambers* v. *Taylor*, Cro. Eliz. 900 (1602), but would no doubt be held to be of superior authority. At the same time, *Fitzjohn* v. *Mackinder* can hardly be considered as a thoroughly satisfactory and conclusive precedent, for various reasons given already in Chapter II.

[*99] * CHAPTER X.

FAVOURABLE TERMINATION OF PROSECUTION—EVIDENCE.

In order to recover damages for malicious prosecution the plaintiff must prove that the prosecution has come to an end, and has been decided in his favour, unless the proceeding against the plaintiff was *ex parte* and he could not be heard. There are several decisions as to what constitutes a termination of a prosecution in favour of the accused.

We have seen already that the writ of conspiracy contained an allegation necessary to be proved, that the plaintiff had been indicted and acquitted; and the inapplicability of this procedure to cases where the grand jury had thrown out the bill was one of the distinctions between the action in conspiracy and the action on the case.

It was always the law that in an action on the case or for malicious prosecution the acquittal or other favourable termination must be pleaded, and that a declaration not containing the allegation was demurrable.[1] *Arundel* v. *Tregono*, Yelv. 116

[1] In all actions for malicious prosecution whether by indictment, arrest, attachment, or suing out a commission of bankruptcy, it must be alleged in the declaration that the proceedings are legally at an end: Davis *v.* Clough, 8 N. H. 157; Heyward *v.* Cuthbert, 4 McCord, 354; Harden *v.* Borders, 1 Ired. Law, 143; McWilliams *v.* Hoban, 42 Md. 57 (1874), Bowie, J.; Potter *v.* Casterline, 12 Vroom. 202 (1879), Woodhull, J.; Severance *v.* Judkin, 73 Me. 376 (1882). Appleton, J.; Woodworth *v.* Mills, 61 Wis. 44 (1884), Taylor, J.; Barrell *v.* Simonton, 2 Cr. C. C. 657; McCormick *v.* Sisson, 7 Cowen, 715; Gorton *v.* DeAngelis, 6 Wend. 421; Clark *v.* Cleveland, 6 Hill, 344; O'Brien *v.* Barry, 106 Mass. 300; and it must be alleged how it was ended: Coles *v.* Hauks, 3 Monroe, 208; Teague *v.* Williams, 3 McCord, 461; though the omission to allege either that fact or the mode would be cured by verdict: Weinberger *v.* Shelby, 6 W. & S. 336. A discharge on a *habeas corpus* is a termination: Charles *v.* Abell, Bright. (Pa.) 131; Zebley *v.* Storey, 2 Crum. (Pa.) 478 (1888), Paxson, J., *contra* Schoffel *v.* Kleinz, Bright. (Pa.) 132, n. The entry of a *nol. pros.* for any other reason than irregularity or informality is a good termination: Woodworth *v.* Mills, 61 Wis. 44 (1884), Taylor, J.; Brown *v.* Randall, 36 Conn. 56; *contra* Garing *v.* Fraser, 76 Me. 37 (1884), Virgin, J.; but in a criminal proceeding such entry is not sufficient without a discharge of the prisoner: Graves *v.* Dawson, 130 Mass. 78; Hatch *v.* Cohen, 84 N. C. 602. The termination may be by previous settlement: Gallagher *v.* Stoddard, 47 Hun. (N. Y.) 102 (1888), Martin, J.; or in a criminal proceeding by a dismissal by the district attorney without trial: Kelley *v.* Sage, 12 Kans. 109; Bell *v.* Matthews, 37 Id. 686 (1887); but an arrest of judgment after conviction is not a proper termination: Kirkpatrick *v.* Id., 39 Pa. 288.

(1608); *Fisher* v. *Bristow*, 1 Dougl. 215 (1779); *Morgan* v. *Hughes*, 2 T. R. 225 (1788). In *Fisher* v. *Bristow* the reason of this was pointed out to be that, if it were not so, a plaintiff might recover * damages for a malicious indictment, [*100] and afterwards be convicted upon it.

In *Whitworth* v. *Hall*, 2 B. & Ad. 695 (1831), it was held that a declaration in case for maliciously and without probable cause suing out a commission of bankruptcy against the plaintiff was demurrable, because it did not allege that the commission had been superseded. *Castrique* v. *Behrens*, 3 E. & E. 720 (1861) was a somewhat similar action for maliciously and without reasonable and probable cause causing a foreign Court to condemn the plaintiff's ship *in rem*. The declaration did not aver that the plaintiff could not, or did not, intervene, or that the judgment had been reversed. Crompton, J., delivered judgment, holding the declaration bad on demurrer, on the ground that, "if in the proceeding complained of the decision was against the plaintiff and was still unreversed, it would not be consistent with the principle on which law is administered for another Court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause. There is no direct authority on the point, but it seems to us that the same principle . . . applies where the judgment, though in a foreign country, is one of a Court of competent jurisdiction, and come to under such circumstances as to be binding in this country."

When the prosecution alleged to have been malicious was for misdemeanor, and the plaintiff was acquitted, he can prove his acquittal without producing a copy of the record; though if the crime of which he was * acquitted was felony, he [*101] must produce it. *Morrison* v. *Kelly*, 1 W. Bl. 384 (1762).

A prisoner on his acquittal has a right to receive, on demand, a copy of the record of his acquittal.[1] *R.* v. *Brangan*, 1 Leach, C. C. 27 (1742). In 16 Car. II. an order was made and signed by five judges, in consequence of persons being hindered from prosecuting by the frequency of actions for malicious prosecution, that no copy of any indictment for felony should be given at the sessions at the Old Bailey without special order, upon motion made

[1] In North Carolina the plaintiff cannot recover in case for malicious prosecution without producing the record of his acquittal: Williams *v.* Woodhouse, 3 Dev. (N. C.) 257 (1831).

in Court, at the general gaol delivery. This order was re-published, by direction of the Court, in the May session of 1739, three years before *R.* v. *Brangan*, and upon the acquittal of Brangan his counsel moved for an order for a copy of the indictment to be delivered to him. Willes, C. J., refused to make the order, on the ground that the order of the Court did not override the common law right of prisoners on their acquittal "to a copy of the record of such acquittal for any use they might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out."

It seems probable that the reversal on appeal of a conviction is not a termination favourable to the person convicted upon which he can found an action for malicious prosecution. *Reynolds* v. *Kennedy*, 1 Wils. 232 (1748), which has frequently been quoted as an authority, was an appeal from the Court of King's Bench in Ireland. The declaration was for seizing the plaintiff's brandy, and "falsely and maliciously" exhibiting an [*102] *information against him before the sub-commissioners of excise for not having paid duty upon it. It alleged that the sub-commissioners condemned the brandy, and that the commissioners of appeal "most justly reversed the judgment of the sub-commissioners." It was held that as to the information before the sub-commissioners the declaration showed a foundation for the prosecution, and that as to the appeal "we cannot infer, from the judgment of reversal of the commissioners of appeal, that the defendant, the prosecutor, was guilty of any malice."

In *Mellor* v. *Baddeley*, 2 Cr. & M. 675 (1834), the plaintiff had been convicted of night poaching under 1 & 2 Will. 4, c. 32, and had suffered imprisonment in default of paying a fine, though he might under the statute have appealed. He was nonsuited, and the Court of Exchequer refused a rule; but *Reynolds* v. *Kennedy* was not referred to.

In *Basébé* v. *Matthews*, L. R. 2 C. P. 684 (1867), it was argued that a declaration was not demurrable which alleged a summary conviction from which there was no appeal, and the argument was not successful.

In *Boaler* v. *Holder*, 51 J. P. 277, and 3 Times Law Rep. 546 (1887), the plaintiff was indicted for publishing a libel knowing it to be false, and was convicted upon that indictment of publishing a libel, and sentenced to a term of imprisonment, which he

duly underwent. Wills and Day, JJ., held that judgment had, upon proof of these facts, been wrongly given for the defendant, and made an order absolute for a new trial. *It appears [*103] from the Times report that the jury expressly found the plaintiff not guilty of publishing a libel knowing it to be false, and that, consequently, so far as the plaintiff was prosecuted for that offence, the prosecution terminated favourably to him.

Where the statement of claim alleges that proceedings analogous to a prosecution have terminated, it may, in some cases, be presumed by reasonable intendment that the termination was favourable to the plaintiff. *Redway* v. *McAndrew*, L. R. 9 Q. B. 74 (1873).

The single exception to the rule that the prosecution must have terminated favourably to the plaintiff is that it does not apply to cases where the proceeding were *ex parte*, and the plaintiff had no opportunity of being heard. See *Stewart* v. *Gromett*, 7 C. B. N. S. 191 (1859), in which the defendant had made an *ex parte* application to a magistrate to bind the plaintiff, over to keep the peace, and the plaintiff, in default of finding sureties, had been imprisoned for six months. The declaration setting out these facts was held good on demurrer, on the ground that in this instance, as in the case of maliciously exhibiting articles of the peace (*a*), the usual rule as to a favourable termination did not apply.

(*a*) A person against whom articles of the peace are exhibited cannot be heard to contradict the statements in them, but must be bound over if they show sufficient cause. R. *v.* Doherty, 13 East, 171 (1810).

[* 104] # *CHAPTER XI.

WANT OF REASONABLE CAUSE MUST BE PROVED BY THE PLAINTIFF.

Since the decision of the Court of Appeal in *Abrath* v. *N. E. Rail. Co.*, 4 Q. B. D. 440 (1883), it has been clearly established that the plaintiff cannot succeed unless he has proved not merely that there may not have been reasonable cause, but that as a matter of fact there was not reasonable cause. The question has, however, in earlier cases, given rise to a good deal of difficulty, plaintiffs having insisted that when they had proved the prosecution and its termination favourably to themselves they were entitled to recover, unless the defendants could show reasonable cause for having prosecuted.

In *Golding* v. *Crowle*, Sayer's Rep. 1 (1751), which was decided mainly upon another point (*a*), it was said to have been laid down in *Savill* v. *Roberts* that, where the grand jury had found a true bill, the defendant was not "obliged to prove a probable cause for preferring the bill; but it shall lie upon the plaintiff to prove express malice." I do not think that Holt, C. J., in *Savill* v. *Roberts*, went so far as to suggest that the finding of a true bill by the grand jury negatived want of reason-
[* 105] able * cause for preferring it. It was more than once held subsequently that a plaintiff who had merely proved his acquittal, without giving further evidence of want of reasonable cause, must be nonsuited. *Purcell* v. *Macnamara*, 9 East, 361 (1808); *Byne* v. *Moore*, 5 Taunt. 187 (1813). In the latter of these cases the indictment is said to have been for slander. *Nicholson* v. *Coghill*, 4 B. & C. 21 (1825), was an action for malicious arrest, and the facts were that the defendant had the plaintiff arrested on mesne process, filed no declaration until he was ruled to declare, and when he was ruled to reply discontinued and paid the costs. This was held to be sufficient evidence of

(*a*) *Vide ante*, p. 58.

malice and want of reasonable cause to sustain a verdict for the plaintiff, and Bayley, J., in giving his judgment, referred to the following passage in Buller's Nisi Prius (B. N. P. 14): "And when the facts lie in the knowledge of the defendant himself, he must show a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice. *Parrot* v. *Fishwick*, London after Trinity, 1772." I think that, except in so far as it is an excellent piece of advice in the conduct of defences, especially now that the question of reasonable cause is practically decided by the jury, this statement of Buller's must be considered bad law. Nor do I think that it was borne out by the case on which it was founded, a note of which is appended to the report of *Purcell* v. *Macnamara*, 9 East, 361, at p. 362, n. The action of *Parrot* v. *Fishwick* was tried by Lord Mansfield, who appears to have told the jury, in summing-up, * that as there had been in that case a [* 106] true bill found, and an acquittal by the petit jury, "it was not necessary to prove *express* malice; for *if it appeared* that there was *no probable cause*, that was sufficient to prove an *implied* malice, *which was all that was necessary to be proved to support this action*. For in this case all the facts lay in the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power and incumbent on him to prove it." It appears to me that the words "this action" apply not to actions for malicious prosecution generally, but to the particular action which Lord Mansfield was then trying.

In *Willans* v. *Taylor*, 6 Bing. 183 (1829)—on the first occasion of its coming before the Court—it was held generally, that a plaintiff who gives some evidence of want of reasonable cause puts it on the defendant to prove reasonable cause affirmatively. In *Cotton* v. *James*, 1 B. & Ad. 128 (1830), Lord Tenterden said: " . . . in general the plaintiff must give some evidence showing the absence of probable cause. But such evidence is, in effect, the evidence of a negative, and very slight evidence of a negative is sufficient to call upon the other party to prove the affirmative." *Brooks* v. *Blain*, 39 L. J. C. P. 1 (1869), is another authority to the effect that the plaintiff must prove his case.

These decisions have to some extent lost their importance since the decision of *Abrath* v. *N. E. Rail. Co.* 11 Q. B. D. 440 (1883). In that case the judgment of the Divisional Court in the plaintiff's

favour rested mainly on the ground that Mr. Justice
[* 107] Cave had * misdirected the jury in telling them that the onus of proving that the defendants did not take reasonable means to inform themselves of the true facts of the case rested on the plaintiff. It was to this point that the arguments and judgments in the Court of Appeal were mainly directed, and on this point all the members of the House of Lords agreed with the Court of Appeal, though they did not discuss it in their judgments. Under these circumstances it seems to me that the judgments of the Master of the Rolls and Lord Justice Bowen are the *locus classicus*, for the proposition, that the plaintiff in malicious prosecution must prove his case.

The following extracts from the judgment of Bowen, L. J. (*b*); contain, I think, the existing law on the subject:—

"This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent (*c*), and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the evidence of reasonable and probable
[* 108] cause; and, lastly, that the proceedings of which * he complains were initiated in a malicious spirit; that is, from an indirect and improper motive, and not in furtherance of justice. All these three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff. I think the whole of the fallacy of the argument addressed to us lies in a misconception of what the learned judge really did say at the trial, and in a misconception of the sense in which the term 'burden of proof' was used by him. Whenever litigation exists somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails; if he makes a *primâ facie* case, and nothing is done to answer it, the defen-

(*b*) 11 Q. B. D. at p. 455.

(*c*) I know of no other authority for this proposition. It may be assumed that no jury would ever return a verdict for a plaintiff whom they believed to have been guilty; but it is quite conceivable that a guilty man might be prosecuted maliciously and without reasonable cause, and acquitted. Would he be legally entitled to recover?

dant fails.[1] The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case; for it is obvious that, as the controversy involved in the litigation travels on, the parties, from moment to moment, may reach points at which the onus of proof shifts, and at which the tribunal will have to say that, if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls * over until [*109] again there is evidence which once more turns the scale.

That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof." The Lord Justice then points out that sometimes definite questions are put by the judge to the jury, as had happened in the case before him, and as, I imagine, will more and more frequently happen in actions for malicious prosecution. He proceeds:—"If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about onus of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal

[1] The burden of showing want of probable cause is, in the first instance, on the plaintiff: Wheeler *v.* Nesbitt, 24 How. 544 (1860), Clifford, J.; and there must be evidence of the absence of such probable cause before the defendant can be called on to justify his conduct; but as this is a negative, slight evidence will generally be sufficient: McCormick *v.* Sisson, 7 Cowen, 715; Gorton *v.* DeAngelis, 6 Wend. 418; Stone *v.* Crocker, 24 Pick. 81; Johnson *v.* Martin, 3 Murray, 248; Plummer *v.* Theen, 3 Hawks. 35; Williams *v.* Norwood, 2 Yerger, 329; Graham *v.* Noble, 13 S. & R. 233; Prough *v.* Antriken, 11 Pa. St. 81; Smith *v.* Ege, 52 Id. 419 (1865); Sutton *v.* Anderson, 103 Id. 151 (1883), Green, J.; Straus *v.* Young, 36 Md. 246 (1872), Grason, J. If there was probable cause, the action cannot be sustained, even though the prosecution complained of was malicious: Miller *v.* Milligen, 48 Barb. 30 (1886), Ingalls, J.

witness called for the plaintiff, it is unnecessary to explain to them about the onus of proof, because the only answer which they have to give is Yes or No, or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence, and rules for determining the weight of conflicting evidence; but they are not [* 110] the same as onus of proof. Now, in an * action for malicious prosecution, the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition, that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff.

"The terms 'negative' and 'affirmative' are, after all, relative, and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative, according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of asserting that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be [* 111] explained on special grounds." The following * paragraph states the ways in which the jury may be asked for their verdict, and the way in which the jury in Abrath's case were asked for it. The judgment proceeds:—

"The question whether there was want of reasonable and probable cause depended upon the materials which were in the pos-

session of the prosecution at the time it was instituted, and also on the further point, whether those materials were carefully collected and considered. Now, there might be two views of the materials which were in the possession of the prosecution. It may be said that the materials were evidently untrustworthy, or that they were obviously trustworthy, according as the one view or the other is taken of the facts. The burden of showing carefulness in the inquiry would be shifted according to the view of the facts adopted. If the materials were admittedly untrustworthy, that would be a strong reason for throwing on the defendants the burden of showing that they, nevertheless, had been misled, after all their care, into relying upon worthless materials. If the materials were obviously trustworthy, they would be enough, *primâ facie*, to justify those who trusted to them. The view for the plaintiff is, as it seems to me, that, as a matter of law, Cave, J., ought to have assumed that the materials in the possession of the prosecutors at the time they instituted the prosecution were untrustworthy and suspicious, and that he ought to have directed the jury to go on and consider, as if it were an independent matter, whether the prosecution had so conducted themselves as to relieve themselves of this grave opprobrium of having acted upon *worthless materials; in effect, that he [* 112] ought to have left them to a specific issue whether the inquiry had been conducted reasonably and properly by the prosecution—whether they had collected the information carefully. Now, I think that would have been a mistake in law. The trustworthiness of the materials—I do not mean the legal inference to be drawn from them, but the worth of them—was a question of fact, not a question of law—a question of fact depending on the view the jury took about the evidence; and it seems to me that Cave, J., would have been wrong in dividing into two parts the questions of fact, assuming one-half necessarily to be decided one way, and telling the jury that the onus of proof shifted about the other. He put the two together, and asked the jury a question, I think, covering the whole of the controversy—whether the defendants took reasonable care to inform themselves of the true state of the case? He then told the jury that they must bear in mind that it lay on the plaintiff to prove that the railway company did not take reasonable care to inform themselves of the true state of the facts. The meaning of that is, that if the jury

were not satisfied whether the defendants did or did not take proper care—inasmuch as the plaintiff was bound to satisfy the jury that the defendants had not taken due care—the defendants would in the end be entitled to the verdict. That direction was quite correct." The Lord Justice concluded as follows :—

"The counsel for the plaintiff contend that the onus lay [*113] on the defendants for this reason. They say : the *plaintiff had been shown to be innocent ; the circumstances under which he was called upon to attend his patient were obviously consistent with innocence, even if McMann [for conspiracy with whom the plaintiff had been indicted] was guilty of imposture, and, apart from any particular proposition, innocence, under these circumstances, will be evidence of want of reasonable and probable cause. That was the contention. The plaintiff's counsel thus insisted upon drawing a line half down their own case. The whole case was made up of a quantity of facts, and if one group of facts was treated in the sense most favourable to the plaintiff, no doubt it would have established a strong case against the defendants which they ought to answer by proving, if they can, another group of facts. But the plaintiff's counsel had no right to divide their case in that manner, and to assume that an inference is to be drawn from half their facts, which throws an additional burden upon the defendants with regard to the other half. That is the real vice in their argument. It is contended that the defendants ought to have known that the witnesses against the plaintiff were persons of bad character. But this is a matter which affects the weight of their evidence, and not the onus of proof. It may be that it was a proper argument to be addressed to the jury, to ask them to find that, even if all these stories had been told to the defendants, still they were told by persons whom the defendants ought not to have accepted; that was a perfectly fair argument to address the jury; but it [*114] was an argument on a matter of fact, and not on *a matter of law, and the plaintiffs' counsel had no right to ask the learned judge to tell the jury to assume that a limited portion of the facts in evidence, as a matter of law, established a case against the defendants which the defendants had to answer by setting up some special case of their own. To do that would be to attempt to make the onus of proof shift in the middle of a conflict of evidence, whereas, as I explained when I began my

judgment, the onus of proof is not a matter which enables a jury to decide between conflicting witnesses; and when there is evidence on which reasonable men may act one way or the other, to ask the learned judge to lay down such a rule as to shift the onus of proof in the middle of the case, would be to ask him to misdirect the jury; but the learned judge, so far from misdirecting the jury by adopting that view, directed the jury quite rightly.

"Something has been said about innocence being proof, *primâ facie*, of want of reasonable and probable cause. I do not think it is. When innocence wears that aspect it is because the fact of innocence involves with it other circumstances which show that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or, if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only *an identical proposition to infer that, [*115] if the accused is innocent, there must have been a want of reasonable and proper care. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. The ground of our decision comes back to what was suggested. Who had to make good their point as to the proposition whether the defendants had taken reasonable and proper care to inform themselves of the true state of the case? The defendants were not bound to make good anything. It was the plaintiff's duty to show the absence of reasonable care . . . ."

[*116] *CHAPTER XII.

EVIDENCE AS TO PLAINTIFF'S CHARACTER.

It appears to have been the rule that, in actions for malicious prosecution, evidence that the plaintiff bore a bad reputation generally was admissible, but not the grounds of it.[1] See *Rodriguez* v. *Tadmire*, 2 Esq. 721 (1799); and *Cornwall* v. *Richardson*, Ry. & M. 305 (1825); also *Downing* v. *Butcher*, 2 Moo. & R. 374 (1841), which latter, however, was an action for false imprisonment. As the plaintiff is, now-a-days, a necessary witness, and may be cross-examined to credit, the point is of hardly any inportance.

[1] The plaintiff may give evidence of good character and reputation: Blizzard *v.* Hays, 46 Ind. 166; Woodworth *v.* Mills, 61 Wis. 44 (1884), Taylor, J.

As a general rule, evidence of plaintiff's bad character is inadmissible, but where the question of character is involved in the nature of the action the plaintiff's general bad repute may be shown to reduce damages: Gregory *v.* Chambers, 78 Mo. 294; Fitzgibbon *v.* Brown, 43 Me. 169; and sometimes such evidence is received as affecting the existence of probable cause: 2 Green. Evid. Sec. 458. In Winebiddle *v.* Porterfield it was ruled by Mr. Justice Coulter that evidence of the bad character of the plaintiff since the complaint made is inadmissible: 9 Pa. St. 137 (1848). Yet, if other circumstances of suspicion are shown, such evidence may be given because it may constitute a sufficient cause: Miller *v.* Brown, 3 Mo. 127; Bostick *v.* Rutherford, 4 Hawks. 83.

In New York the defendant is competent to testify whether he was actuated by ill will or malice: McCormick *v.* Woodworth, 47 Hun. 71 (1888), Martin, J. A witness cannot rehearse testimony given before a magistrate by witnesses other than the defendant: Cotton *v.* Huidekoper, 2 P. & W. 149 (1830), Rogers, J.; John *v.* Bridgman, 27 Ohio, 22 (1875), Whitman, J.; *contra* McMahon *v.* Armstrong, 2 Stew. & Port. (Ala.) 151 (1832); Bacon *v.* Towne, 4 Cush. 217 (1849); Goodrich *v.* Warner, 21 Conn. 443 (1852); but a competent witness who was present may prove that no evidence in support of a criminal charge was offered by defendant: Richards *v.* Foulke, 3 Ohio, 52 (1827). When there is a question of probable cause, evidence of suspicious behavior of the plaintiff is admissible: McRea *v.* Oneal, 2 Dev. (N. C.) 166 (1829).

* CHAPTER XIII. [*117]

DAMAGES—SPECIAL DAMAGES—COSTS.

A SUCCESSFUL plaintiff in an action for malicious prosecution is entitled to recover damages for the costs of his defence, which used to be considered the main ground, and was probably the original ground, of the action, and for the indignity and injury to his fame or credit caused by the prosecution[1] (*Savill* v. *Roberts*, 1 Ld. Raym. 374 (1678); and if he has been charged together with other persons, he can recover in respect of the general costs of their defence, if he made himself liable. *Rowlands* v. *Samuel*, 11 Q. B. 39 (1847).

Special damage is not necessary to found the action, as the injury to reputation is enough, *Smith* v. *Cranshaw*, Sir W. Jones, 93 (1 Car. I.); and *Jones* v. *Gwynn*, 10 Mod. 148 and 214 (1713).

[1] In this action, the jury may award damages for the injury done to the plaintiff's reputation by the charge made against him: Odgers on Libel (Blackstone Text Book Series), 14. Where a civil suit is terminated in favour of the defendant, the plaintiff is liable to an action for damages sustained in excess of taxable costs: Clossen *v.* Staples, 42 Vt. 209; mental suffering and injury to the feelings constitute elements of compensatory damages, and in addition, exemplary damages may be allowed: McWilliams *v.* Hoban, 42 Md. 57 (1874), Bowie, J. When no actual damage is suffered, no exemplary damages can be recovered: Schippel *v.* Norton, 38 Kans. 567 (1888), Valentine, J.

Consequential damages may be required for injury to the business credit of the plaintiff and expenses incident to the former suit: Lawrence *v.* Hagermann, 56 Ill. 68; Wood *v.* Finnell, 13 Bush (Ken.) (1878), Pryor, J.

The fees of counsel are not to be taken into account in estimating damages: Good *v.* Mylin, 8 Pa. St. 51; Alexander *v.* Herr, 11 Id. 537; Stopp *v.* Smith, 71 Id. 285; Hiches *v.* Foster, 13 Barb. 424; *contra* the two above cases in Illinois and Kentucky decide a different rule. To recover special damages, the declaration of statement should, with particularity, set out the cause which produced them: Stanfield *v.* Phillips, 78 Pa. 73 (1875), Gordon, J.; but on the trial the defendant may show the plaintiff's bad reputation in mitigation of damages. Sayre *v.* Sayre, 1 Dutch. (N. J.) 235, Green, C. J., the leading case, Bacon *v.* Towne, 4 Cush. 27.

While proof of defendant's good faith is admissible to mitigate punitory damages, it cannot be considered to mitigate compensatory damages including those allowed for injury to the feelings: Fenelon *v.* Butts, 53 Wis. 344 (1881), Orton, J. If the damages are excessive, a new trial may be granted: Blunt *v.* Little, 3 Mason, 102. As to a military case involving questions of malicious prosecution and compensatory damages: McCall *v.* McDowell, 1 Abbott, 212 (1867), Deady, J.

But the cases where there was none can never have been common, and are not likely to recur now, although I apprehend that an action would lie for maliciously and without reasonable cause applying for a summons which the magistrate refused.

[* 118] In *Jennings* v. *Florence*, 2 C. B. * N. S. 467 (1857), it seems to have been thought necessary to aver special damage in an action for malicious arrest, where an arrest for a smaller sum would not have been actionable; but in *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; 52 L. J. Q. B. 488 (1883), it was held that it was not necessary to prove special damage in order to recover for maliciously presenting a petition to wind up a company.

The amount of damage is, in this, as in other actions for tort, a question on which the Court will seldom interfere with the findings of the jury. The rule is laid down in *Leith* v. *Pope*, 2 W. Bl. 1326 (1780), several cases being collected in a note. The plaintiff was a baronet, and the defendant a money-lender who had prosecuted him for larceny, and admitted in cross-examination, that his true reason for the prosecution was to get rid of some actions for usury which the plaintiff had brought against him. The jury gave the plaintiff 10,000*l.*, which even now would be a remarkable verdict, and the Court of Common Pleas discharged a rule for a new trial on the ground of excessive damages, observing, that "in cases of tort the Court will not interfere on account of the largeness of the damages unless they are so flagrantly excessive as to afford an internal evidence of the prejudice and partiality of the jury. That is, unless they are most outrageously disproportionate either to the wrong received, or to the situation and circumstances of either the plaintiff or defendant."

[* 119] The costs of defending an action against a chief * constable for malicious prosecution could not be charged to the borough fund or borough rate, under 5 & 6 Will. IV. c. 76, s. 82 (*a*) though the prosecution had been direction of certain of the borough magistrates." *R.* v. *Mayor, &c., of Exeter*, 6 Q. B. D. 135 (1880).

Where a plaintiff had been prosecuted for perjury on several assignments, and had given evidence as to one assignment only,

(*a*) This Act is now repealed by 45 & 46 Vict. c. 50.

and recovered damages in respect of it, it was held that he was not entitled to the costs of witnesses whom he did not call, but who would have given evidence as to the other nine assignments, which were about an entirely separate matter. The defendant was not entitled to the cost of his witnesses as to the nine assignments, because the indictment was one cause of action. *Delisser* v. *Towne*, 1 Q. B. 333 (1841).

[* 120]

* CHAPTER XIV.

THE DISTINCTION BETWEEN MALICIOUS PROSECUTION AND FALSE IMPRISONMENT.

It often happens that a malicious prosecution is preceded or accompanied by a false imprisonment, and that an action is brought for both wrongs together. They are, however, essentially different. False imprisonment is wrongfully restraining the personal liberty of the plaintiff. Malicious prosecution is wrongfully setting the criminal law in motion against him.[1] Restraining the personal liberty of another person is *primâ facie* a wrongful act;

[1] The difference between the action for malicious prosecution and maliciously and vexatiously arresting and holding defendant to bail is lucidly explained by Mr. Justice Ross in Wengert *v.* Beashore, 1 P. & W. 235 (1830), which was followed by Chief Justice Gibson in Herman *v.* Brookerhoff, 8 Watts, 242 (1839). The malicious abuse of civil process lies where a capias is sued out for some collateral object of oppression, as to extort property illegally from the defendant: Sommer *v.* Wilt, 4 S. & R. 19; Baldwin *v.* Weed, 17 Wend. 224; Plummer *v.* Dennett, 6 Greenleaf, 421; Turner *v.* Walker, 3 Gill & John. 378.

In this action it is not necessary to show want of probable cause nor that the suit was terminated, but malice must be proved. The gist of an action for false imprisonment is the unlawful detention, and the general rule is that malice may be inferred from want of probable cause: McCarthy *v.* DeArmit, 3 Out. 63 (1881), Trunkey, J. It is now well settled that arresting, imprisoning or holding to bail, if done maliciously and without probable cause, is actionable: Ray *v.* Law, 1 Peters C. C. 207; Brush *v.* Burt, 2 Penn. (N. J.) 979; Wickliffe *v.* Payne, 1 Bibb. 413. As to what is an arrest in law consult Collins *v.* Fowler, 10 Ala. St. 859; as to what is a holding to bail, Goslin *v.* Wilcock, 2 Wilson, 302; Boon *v.* Maul, 2 Penn. (N. J.) 862; as to maliciously suing out an attachment, Lindsay *v.* Larned, 17 Mass. St. 190; Whipple *v.* Fuller, Conn. 582; Bump *v.* Betts, 19 Wend. 421; Young *v.* Gregory, 3 Call. 446; Shaver *v.* White, 6 Mumford 110; Donell *v.* Jones, 13 Ala. 491; as to maliciously suing out a domestic attachment, Williams *v.* Hunter, 3 Hawks. 545; Tomlinson *v.* Warner, 9 Ohio, 103.

The difference between the two actions has been very clearly stated by Professor Pollock in his treatise on Torts, page 191; also in Hope *v.* Evered, 17 Q. B. D. 338 (1886); Addison on Torts (5th Ed.), 130; Perryman *v.* Lister, Shirley's Lead. Cas. 352.

A person who has procurred the imprisonment of another on a lawful warrant is not liable to an action for false imprisonment, Muller *v.* Brown, 138 Mass. 114 (1884), but if the warrant were void and there were an arrest under it, the remedy must be trespass, Braveboy *v.* Cockfield, 2 McMullin, 270.

As to cases of special note on false imprisonment, Thurston *v.* Martin, 5 Mason, 497 (1830); Beckwith *v.* Bean, 8 Otto, 266 (1878).

in other words, it is a thing which requires to be excused in order to show that it is not wrongful. Setting the criminal law in motion is *primâ facie* a thing which any person has a right to do, and it is necessary for a plaintiff, as has been explained in the preceding chapter, to show that in the particular instance it was done wrongfully, *i. e.*, maliciously and without reasonable cause, before he can recover for it. This is clearly stated by Lords Mansfield and Loughborough in *Johnstone* v. *Sutton*, 1 T. R. at p. 544 (1786). They say: "There is no similitude or analogy between an action of trespass, or false imprisonment, and this *kind of action. An action of trespass is for [*121] the defendant having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal."

The distinction between wrongfully seizing the plaintiff, *e. g.*, where a person, not being a constable, arrests, although no felony has been committed, and locking him up, and wrongfully laying an information before a magistrate, is clear enough. Confusion is more likely to arise when a private person charges the plaintiff with an offence and causes him to be taken into custody.

The distinction, in such a case, between the two torts is explained in *Austin* v. *Dowling*, L. R. 5 C. P. 534; and 39 L. J. C. P. 260 (1870). The plaintiff sued the defendant in the Bristol County Court for false imprisonment, expressly waiving any right of action he might have for malicious prosecution. The plaintiff lodged in the defendant's house and owed him money, and the defendant seized the plaintiff's goods as security. The plaintiff fetched a policeman and demanded his goods, which demand being refused, he went upstairs and broke the door of the room where his goods were. The defendant thereupon gave the plaintiff in charge for felony in breaking the door, and the policeman took him to the station. The inspector at the station declined to keep the plaintiff in custody unless the defendant charged him with felony and signed the charge-sheet, which the defendant did, the charge being "feloniously breaking and entering into a bedroom" in * the defendant's [*122] house. The plaintiff was therefore detained in custody, bail being refused, until the next morning, when the magistrates dismissed the charge. The County Court judge held that the whole transaction amounted to malicious prosecution, which

County Courts have no jurisdiction to try (9 & 10 Vict. c. 95, s. 58), and nonsuited the plaintiff, at the same time stating a case for the superior Court. The Court held that the imprisonment at the police station was imprisonment by the defendant, because the defendant knew that his making the charge would cause the plaintiff to be imprisoned, and that otherwise the inspector of police would not detain him; that the police inspector was not a judicial but only a ministerial officer of justice, and that the false imprisonment did not end, or the malicious prosecution begin, until the charge was made next morning before the magistrate. Willes, J., said that there was clearly evidence of false imprisonment, and proceeded:—"How long did that state of false imprisonment last? So long, of course, as the plaintiff remained in the custody of a ministerial officer of the law whose duty it was to detain him until he could be brought before a judicial officer. Until he was so brought before the judicial officer there was no malicious prosecution. The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained [*123] until the matter can be investigated. The * party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment" (*a*). In *Morgan* v. *Hughes*, 2 T. R. 225 (1788), the defendant was a magistrate, who had been asked to settle a dispute about a sheep, and who of his own motion issued a warrant upon which the plaintiff was arrested. It was held that the declaration ought to have been in trespass for false imprisonment, and not, as it was, in case for malicious prosecution. If this decision were now to be upheld, it would probably be on the ground that the defendant, when he issued the warrant, was not acting in his judicial capacity.

(*a*) This distinction does not appear to have been clearly apprehended by the parties to Dawson v. Vansandeau, 11 W. R. 516 (1863), whose curious and rather confused story is told on p. 51.

(HOW THE ACTION OF MALICIOUS PROSECUTION CAN BE MAINTAINED AND OTHER INCIDENTS CONNECTED WITH IT, STATED IN BRIEF.)

The foundation of the action for malicious prosecution is the malice of the defendant either express or implied; and whatever engines of the law malice may employ to compass its evil designs against innocent persons, the action on the case affords an adequate remedy to the party injured.

The essential ground of the action is that a legal prosecution was carried on without a probable cause; but this must be expressly proved and cannot be implied.

The question of probable cause is a mixed proposition of law and fact. Whether the circumstances, alleged to show it probable or not probable, are true and existed, and a matter of fact; but, whether supposing them true, they amount to a probable cause, is a question of law.

The question of malice, which is to be considered not in the sense of hatred or spite but of *malus animus*, is one which must go to the jury and may be implied from want of probable cause.

The following grounds will support the action: Damage to a man's fame; danger to his life, limb, or liberty; damage to a man's property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused; a civil suit, though there be no seizure of person or property.

The defence of proper and competent counsel will not avail, if the defendant was unlawfully encouraged in bringing suit, or if the statement of facts was knowingly incorrect, or counsel or client acted in bad faith toward each other.

The form of the action for malicious prosecution is an action of trespass on the case, which in many states, by legislation, is the action for trespass.

If two or more join in a prosecution without reasonable or probable cause, they are jointly and severally liable to the party injured; and one who participates voluntarily in such prosecution, is liable in damages whether there were others concerned in it or not.

It is requisite to aver in the declaration or statement, every allegation proper to support the action, viz: that the defendant falsely, maliciously, and without reasonable or probable cause did thus and so to the injury of the plaintiff, and to state the trial and acquittal; and as the action cannot be maintained till the prosecution be terminated, such fact must appear upon the face of the declaration; but the want of this averment is cured by verdict, because it will be presumed that it has been proven at the trial.

Care must be taken in framing the declaration or statement, that it will be a full averment of the substance of the charge, told in the style of our simple, abridged pleadings.

The usual matters of evidence are, that the defendant had no reasonable or probable grounds of suspicion against the plaintiff, and that the defendant was actuated by malice.

This rule seems to be founded upon principles of policy and convenience, because the prosecutor should be protected in his legal proceedings, however malicious his private motives may have been, provided he had probable cause for preferring the charge. This protection seems to be one of necessity when it is considered how often it happens that the facts upon which the prosecution is founded are confined to the knowledge of the prosecutor.

Any circumstances, which disprove the malice of the defendant in preferring the charge, should be produced, and it is requisite for the plaintiff to adduce evidence arising out of the circumstances, to show it groundless.

Where the defendant gives evidence of probable cause, a witness may be

examined as to whether the plaintiff was a man of bad character, which is admissible in mitigation of damages.

If the action be not commenced within six years, in most of the states, the Statute of Limitations will bar.

The plaintiff can prove in aggravation of damages, the length of his imprisonment, his expenses, situation and circumstances, or the peril or jeopardy to which a man's life or liberty may be subjected, or the prejudice to his fame and reputation or the expenses of conducting his defence.

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A SELECTION OF

LEADING CASES

IN THE

CRIMINAL LAW.

With Notes.

BY

WALTER S. SHIRLEY, B.C.L., M.A.,

BARRISTER-AT LAW, OF THE INNER TEMPLE AND NORTH-EASTERN CIRCUIT; AUTHOR OF "A SELECTION OF LEADING CASES IN THE COMMON LAW," "A SKETCH OF THE CRIMINAL LAW," "AN ELEMENTARY TREATISE ON MAGISTERIAL LAW," ETC., AND EDITOR OF "WIGRAM'S JUSTICE'S NOTE-BOOK."

WITH AMERICAN NOTES

BY

HORACE M. RUMSEY,

OF THE PHILADELPHIA BAR.

PHILADELPHIA:
THE BLACKSTONE PUBLISHING CO.
1889.

PREFACE.

This is, I believe, the first collection of Leading Cases in the Criminal Law which has ever been published; but it is difficult to see why such a collection should not be as useful in that as in any other branch of the law. At all events, I do not doubt that the book will be found useful —possibly even entertaining—to students and young practitioners, and it is to their attention principally that I commend it.

I have to thank my learned friend, Mr. H. Warburton, of the South Eastern Circuit, for the kind assistance in the way of suggestion and advice which he has given me during the whole time of the preparation of the work for the press. The value of such a collection as this must largely depend on the selection of *the right cases* for "leadership," and it is here that Mr. Warburton's extensive and practical acquaintance with the Criminal Law has been of most service.

My thanks are also due to my learned friends, Mr. C. M. Atkinson and Mr. H. T. Waddy, for occasional help.

W. S. S.

4, Essex Court, Temple.
March, 1888.

LIST OF LEADING CASES.

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LEADING CASES IN CRIMINAL LAW.

Treason Felony.

R. *v.* GALLAGHER AND OTHERS. [1.]

[15 Cox, C. C. 291 (1883).]

THE prisoners were indicted under the Treason Felony Act, 1848 (11 & 12 Vict. c. 12), for compassing to depose the Queen from Ireland, to levy war against her, to make her change her counsels, and to intimidate Parliament.[1] The evidence against them was that they belonged to secret societies in America, whose object was to procure "*the freedom of Ireland by force alone*," and that they had come to England, adequately provided with funds, for the purpose of destroying public buildings by nitro-glycerine and other explosives. On a trial at the Central Criminal Court, before Lord Coleridge, C. J., the Master of the Rolls, and Grove, J., four of the prisoners were convicted, and sentenced to penal servitude for life.

[Edward Clarke, Q.C., Bowen Rowlands, Q.C., J. J. Sims, M. W. Mattinson, Keith Frith, Burnie, H. J. Broun, Sanders and T. Waite for prisoners; the Attorney-General, the Solicitor-General, Poland and R. S. Wright for Crown.]

Direct and constructive war.—[2] War levied against the Queen is of two

[1] Treason against the government consists in levying war against it, adhering to its enemies, giving them aid and comfort: Const. U. S. Art. III. Sec. 3.

The element which constitutes treason is a combination or conspiracy by which several are united in a common purpose, and an attempt to carry such purpose into execution: *In Re* Bollman, 4 Cranch, 75; Druecker *v.* Solomon, 21 Wis. 621.

Under the Act of Congress of 1790, a person to be guilty of treason must owe allegiance to the United States; and this is true under the revised Statutes of the United States, Sec. 5331. Allegiance is of two kinds: that due from citizens and that due from aliens resident within the United States: Charge to the Grand Jury, 23 Law Reporter, 705–710.

[2] War is an attempt by force either to subjugate or to overthrow the government against which it is levied: 2 Bish. on Crim. Law, Sec. 1227.

kinds—direct and constructive. Open and armed rebellion against the person of the sovereign would, of course, belong to the former class.[3] Instances of the latter class are attempts to effect innovations of a public and [*2] *general nature by force. Therefore, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting-houses, and actually pulled down two, it was held to be treason (*a*).[4] *Frost's case.*—But in Frost's case (*b*), it was held that, if a person act as the leader of an armed body, who enter a town, and their object be neither to take the town nor to attack the military, but merely to make a demonstration to the magistracy of the strength of their party, either to procure the liberation of certain prisoners convicted of some political offence, or to procure for those prisoners some mitigation of their punishment, this, though an aggravated misdemeanour, is not high treason. *Pulling down particular house.*—Nor would a tumult, with a view to the pulling down of a particular house, or the laying open of a particular enclosure, be treason, this being no general defiance of public government (*c*).[5]

Foreign Enlistment.

[2.] **R. *v.* SANDOVAL.**

[16 Cox, C. C. 206 (1887).]

The defendant, a foreigner, but resident in this country, was indicted for a breach of the Foreign Enlistment Act, 1870, by fitting out an expedition within the Queen's dominions against a friendly state. It was held, that an offence under sect. 11 of that Act is sufficiently constituted by the purchase of guns and ammu-

(*a*) R. *v.* Dammaree, 8 St. T. 218.
(*b*) 9 C. & P. 129.
(*c*) Fost. 210; 1 Hale, 131.

[3] In case of rebellion, one who adheres to the cause of the rebels giving them aid and comfort can be indicted "for levying war:" Chapman Treason case, M. S. San Francisco, 1863.

[4] If a body of men be actually assembled for the purpose of effecting a treasonable object by force, that is "levying war:" Charge to the Grand Jury, 23 Law Reporter, 705.

A lawful assembly becomes unlawful whenever its members agree to resort to violent and tempestuous measures: State *v.* Brook, 1 Hill (S. C.), 362; State *v.* Snow, 18 Me. 346; Douglass *v.* State, 6 Yerk. 525; State *v.* Alexander, 7 Rich. 5; Kilphart *v.* State, 42 Ind. 273.

A man may lawfully pull down his own house in a tumultuous manner: Penna. *v.* Morrison, Addis. 274.

[5] The disturbance of the public peace must be in the execution of some private object: State *v.* Connely, 3 Rich. 337; Rachels *v.* State, 51 Ga. 374; Kilphart *v.* State, 42 Ind. 273; for if the object be to overthrow the government, it is treason; but if it be to resist the operation of a statute, it is not: 2 Bish. on Crim. Law, Sec. 1226.

nition in this country, and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and shipper that they are to be used in a hostile demonstration against such state, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port belonging to the Queen's dominions.[1]

* "The Act was passed," said Day, J., "to prevent such [*3] mischiefs as the present; and I am of opinion that the moment any overt act of preparation is done the statutory offence is committed, so that such attempts may be defeated and the mischievous consequences likely to ensue to this country may be prevented."

"Nothing can be more mischievous," said Wills, J., "than that the persons who act as the present defendant has done should suppose that they can escape the responsibility for acts done in violation of the municipal law, passed to maintain the requirements of international comity; acts which might be followed by consequences most mischievous, and which under certain circumstances it might be impossible to exaggerate. The present expedition was contemptible, and not of a character seriously to affect our relations with a foreign power; but the law is the same as to a small expedition and a formidable one, as to an expedition against a small state and a great state, and those who took part in it are criminally liable."

[J. P. Grain for prisoner.]

Fitting out expeditions.—The 11th section of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), provides, that "if any person within the limits of her Majesty's dominions, and without the licence of her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state . . . . every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act." And the next section says, that "any person who aids, abets, counsels, or procures the commission of any offence against this Act, shall be liable to be tried and punished

[1] Treason against the United States consists in adhering to its enemies, giving them aid and comfort, as selling arms, sending provisions, or encouraging the enemy in any material way: U. S. *v.* Pryor, 3 Wash. C. C. 234; or getting a vessel ready for service: U. S. *v.* Greathouse, 4 Saw. 457; or aiding in the equipment of a belligerent vessel: U. S. *v.* Grassin, 3 Wash. C. C. 65.

Fitting out or arming vessels to be employed against any foreign state at peace with the United States constitutes an offence under the Act of Congress: U. S. *v.* Quincy, 6 Peters, 445.

as a principal offender." The Act also prohibits enlistment in the service of a foreign state at war with a foreign state at peace with us (*d*), illegal shipbuilding (*e*), &c.

Libels on foreign princes.—Akin to this subject are libels on foreign princes and potentates, which are punishable because they have a tendency to interrupt these pacific relations which ought to subsist between friendly
[* 4] * nations (*f*). Fair criticism on matters of public interest is, of course, allowable, but not violent and abusive denunciation.

Unlawful Assemblies.

[3.] **BEATTY** *v.* **GILLBANKS.**

[9 Q. B. D. 308 (1882).]

A religious association, calling themselves "The Salvation Army," assembled to the number of about a hundred persons, and, forming a procession, headed by flags and music, marched through the streets of Weston-super-Mare, as they had done on previous occasions. They were met by an organized band of roughs, calling themselves "The Skeleton Army," who also were in the habit of parading the streets, and who were antagonistic to "the Salvation Army." The two bodies met, and, as on several previous occasions, a free fight and great disorder ensued. It was held that the salvationists having assembled for a lawful purpose, and with no intention of carrying it out unlawfully, could not be rightly convicted of an unlawful assembly, *notwithstanding that they were aware that a breach of the peace would be very likely to result from their action.*

"What has happened here," said Field, J., "is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing
[* 5] it may cause another to do * an unlawful act. There is no authority for such a proposition."

[E. Clarke, Q. C., Sutherst, and L. C. Jackson, for appellants; A. R. Poole, and Valpy for respondent.]

Real effect of leading case.—Beatty *v.* Gillbanks does not go further than to

(*d*) Sect. 4. (*e*) Sect. 8.
(*f* See R. *v.* D'Eon, 1 W. Bl. 517; and R. *v.* Peltier, 28 St. T. 529.

establish the proposition that an assembly which is lawful in itself does not become unlawful merely because of the disorderly intentions of others.[1] It cannot be regarded (as apparently there is a disposition in some quarters to regard it) as an authority to show that, under all imaginable circumstances, people have a right to have processions through the streets.[2]

What is an unlawful assembly?—"An unlawful assembly is an assembly of three or more persons:—[3]

(a) With intent to commit a crime by open force; or

(b) With intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

"Every unlawful assembly is a misdemeanour" (*g*).

Vincent's case.—In the great case of R. *v.* Vincent (*h*), it was held that, in deciding the question of whether an assembly is unlawful or not, the jury should take into their consideration the hour at which the parties met, and the language used by the persons assembled and by those who addressed them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace.[4]

Public meetings on highways.—It may be observed that there is no right of public meeting on a highway, as some people are apt to suppose. Highways are for travelling along, and not for loitering (*i*). As a matter of fact, however, as we all know, meetings are frequently held on highways, especially at election times; and, provided no obstruction to the traffic, or nuisance to the neighbourhood, is caused thereby, such meetings are generally tolerated by the local authorities, notwithstanding their illegality. Those who convene meetings on highways, however, ought to have the civility to inform the police superintendent of the district of their intention to break the law.

The right of public meeting is also limited in another way. Its object must not be to intimidate or to overawe, but to discuss. "I have ever held," said Lord Brougham, in the House of Lords in * 1848 (*j*), [*6] "that those meetings which are called, whether in England or in Ireland, '*monster meetings*,' are in themselves essentially illegal. They are mere

(*g*) Stephen's Digest, p. 40.

(*h*) 9 C. & P. 91.

(*i*) See Homer *v.* Cadman, 34 W. R. 413; Back *v.* Holmes, 16 Cox, C. C. 263; and Dovaston *v.* Payne, Shirley's Leading Cases in the Common Law, 3rd ed. p. 379.

(*j*) Hans. xcviii. 70.

[1] Persons lawfully assembled may become an unlawful assembly, if their conduct becomes such as would have made them an unlawful assembly at the outset: State *v.* Snow, 18 Me. 346; State *v.* Cole, 2 McCord, 117.

[2] *Any* meeting of great numbers of people with such circumstances of terror as endanger the public peace is an unlawful assembly, 2 Bish. on Crim. Law, Sec. 1256.

[3] The object of the assembly must be of some private nature, and relate to some private quarrel, 4 Black Comm. 147.

[4] 1 Russ. on Crimes, 272, 387. Persons intending a frolic may change their course so as to commit a riot: State *v.* Alexander, 7 Rich. 5.

exhibitions of physical force, and it is only by the perversion of language that they can be affected, or pretended to be meetings for that which becomes an impossibility at them—discussion. . . . This is the view which I, and those with whom I had the honor of acting in the other house of Parliament, openly held on the occasion of the great assemblage in Manchester in August, I think it was, 1819 (*k*). We disapproved loudly, and, as far as we were concerned, unanimously, of the conduct of the Government on that occasion; but the late Lord Abinger and myself, then in opposition to the Government, avowed unhesitatingly that the meeting itself was nevertheless not a lawful meeting."

Political meetings near Westminster Hall.—Political meetings of more than fifty persons may not, generally speaking, be held on the Middlesex side of the river in any street, square or public place, within a mile of Westminster Hall on any day on which either Parliament or the Law Courts are sitting, are about to sit, or have been sitting (*l*). Such a meeting is by statute an unlawful assembly, the object of the legislature being to protect that freedom of debate and that judicial independence upon which the liberties and happiness of Englishmen so much depend.

Futility of proclamations.—One point may be noticed in conclusion. The Government of the day have no power, under the common law, to make a meeting unlawful by proclamation. To have such a power their proclamation must be issued under the provisions of some statute.

The leading case was rather severely criticised by the Irish Court of Appeal in O'Kelly *v.* Harvey (*ll*).

Prize Fighting.

[4.] R. *v.* **ORTON.**

[14 Cox, C. C. 226 (1878).]

A number of persons assembled in a room, somewhere in Leicestershire, a shilling being charged for admission, to witness a prize fight. The combatants fought with gloves, but [* 7] punished one another very severely. It was * held, that if this was a mere exhibition of skill in sparring, it was not illegal; but that if the pugilists met intending to fight till one of them gave in from exhaustion or injury, it was a breach of the law, and a prize fight; *and that their wearing gloves made no difference.*

(*k*) The notorious Peterloo massacre.

(*l*) 57 Geo. III. c. 19, s. 23. The section contains an exception in favour of the parish of St. Paul's, Covent Garden.

(*ll*) 15 Cox, C. C. 435.

[No counsel appeared.]

Illegality of prize fighting.—"No one," says Mr. Justice Stephen, in his Digest of the Criminal Law (*m*), "has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize fight, or other exhibition calculated to collect together disorderly persons." "All these fights are illegal," said Mr. Justice Burrough in R. *v.* Billingham (*n*). "Prize fights are altogether illegal," echoed Mr. Justice Patteson in R. *v.* Perkins (*o*).

Manslaughter.—If one of the combatants in a prize fight is killed, not only is his antagonist guilty of manslaughter, but also the seconds, the promoters, the reporters (*p*), and everybody present and approving (*q*).[1]

Stakeholder.—But in R. *v.* Taylor (*r*), it was held that a mere stakeholder, who was not present at the fight, was not liable as an accessory before the fact in manslaughter where one of the pugilists had been killed. "Nothing that the accused did," said Bramwell, B., "assisted or enabled the fight to take place." [2]

Presence at Prize Fight.

R. *v.* CONEY AND OTHERS. [5.]

[8 Q. B. D. 534 (1882).]

At the close of Ascot races in June, 1881, a prize fight took place somewhere near the high road towards Maidenhead, and the defendants were in the crowd looking on. It was held that, as nothing more had been proved against them than that they had been spectators, their conviction as principals in the second degree was wrong. "It is no criminal offence to stand by," said Mr. Justice Hawkins, * "a mere passive spectator of a crime, [*8] even of a murder. *Non-interference to prevent a crime is not itself a crime.*"

(*m*) Page 122.
(*n*) 2 C. & P. 234.
(*o*) 4 C. & P. 537.
(*p*) *Sed quære.*
(*q*) R. *v.* Murphy, 6 C. & P. 103.
(*r*) L. R. 2 C. C. R. 147.

[1] By countenancing a riot, though doing nothing personally, may be sufficient to become guilty as a rioter: Williams *v.* State, 9 Mo. 268; Treat *v.* Jones, 28 Conn. 334.

[2] To indict one as a rioter there must be, however, a readiness to assist: Penna. *v.* Craig Addison, 190, or a counselling to encourage.

[H. D. Greene and Hammond Chambers for prisoner Coney; Poland, J. R. W. Bros and R. G. C. Mowbray for the Crown.]

Who are aiders and abettors.—The reader will, of course, not miss the point of this case, which is, that *mere voluntary presence at a fight does not, as a matter of law, necessarily render persons so present guilty of an assault, as aiding and abetting in such fight.* If, however, it were shown that the defendants took a walk in the direction of the fight, for the purpose of seeing something of it (and *à fortiori* if they went by train or in omnibusses, with a lot of other blackguards, for the purpose of the "sport"), there would be evidence for the jury of participation and encouragement (*m*).[1]

Mixing with rioters.—In R. *v.* Atkinson (*n*), it was held that, on an indictment for riot, persons are not liable merely on account of their having been present and among the mob, even although they had the power of preventing it.

Armed Poaching by Night.

[6.] **R. *v.* SUTTON.**

[13 Cox, C. C. 648 (1877).]

The prisoners were out poaching one night, and the question which had afterwards to be settled was, whether they were "armed" within the meaning of 9 Geo. IV. c. 69, s. 9. If they were, their weapons were not particularly formidable, consisting as they did principally of *rustic walking sticks* and a *small pitchfork.* The latter instrument, it appeared in evidence, was used by poachers to remove bushes which obstructed their nets, but one of the poachers presented it towards the keepers to prevent their approach. A few *stones* were also thrown, and probably [*9] * these stones came out of the pockets of the poachers. It was held, that there was evidence of the prisoners being armed, and they were found guilty and sentenced accordingly.

[John Rose and C. J. Darling for prisoners; Boddam for Crown.]

(*m*) See R. *v.* Billingham, 2 C. & P. 234.

(*n*) 11 Cox, C. C. 330.

[1] When the requisite number of persons meet, stake their money, and propose to engage in a prize fight, it is a rout and all *present* aiding and encouraging are equally guilty: Sikes *v.* Johnson, 16 Mass. 389; and are liable as principals: State *v.* Straw, 33 Me. 554; Williams *v.* State, 9 Miss. 270; see Duncan *v.* Comm., 6 Dana. 295.

The 9th section.—The 9th section of 9 Geo. IV. c. 69, says, that "if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour."

It will be observed that the statute does not require that it should be proved that *all* of the poachers were armed. It is enough that one was, if the others knew it.

"*Offensive weapons.*" *Stones. Sticks.*—As the leading case shows, it is often difficult to determine the exact meaning of "armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon"; and, the law being always down on poachers, the words have been, perhaps, made to include rather too much. In R. *v.* Grice (*o*), it was held that large stones may be "offensive weapons" if they are capable of doing serious injury, and if they were brought and used by the poachers for that purpose. A stick may or may not be an offensive weapon, according to its size, shape, or length (*oo*).

Perjury—Competent Jurisdiction.

R. *v.* HUGHES. [7.]

[4 Q. B. D. 614 (1879).]

A police constable in Wales procured a warrant to be illegally issued, without either written information or oath, for the arrest of a man named Stanley, on a charge of "assaulting and obstructing him in the discharge of his duty." On this warrant Stanley was arrested, and brought * before the magis- [* 10] trates, who, on the testimony of the police-constable, convicted him. The accused defended himself on the merits, and did not take any objection to the illegality of the manner in which he had been brought before the Court. It afterwards turned out that the constable had been lying, and that Stanley had not really "assaulted and obstructed" him as he had sworn. Accordingly the tables were turned, and Mr. Robert was put on his trial for perjury. Then the ingenuity of the lawyers asserted itself, and it was unblushingly contended on his behalf that he

(*o*) 7 C. & P. 803.
(*oo*) R. *v.* Merry, 2 Cox, C. C. 240.

ought to be acquitted, because, on account of the original informality, the proceedings in which he had sworn were *coram non judice*,—in other words, were not before a competent jurisdiction. This view of the matter, however, was not adopted by the Court, and the conviction was affirmed.

"I think," said Lopes, J., "the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and, being so competent, a false oath, willfully taken, in respect of something material, would be perjury."

[C. S. Bowen and Muir Mackenzie for prisoner; Sir John Holker, Att.-Gen., Poland, and Dicey for Crown.]

Competent jurisdiction.—To constitute the crime of perjury it is necessary, not only that the defendant should swear falsely, but also that the swearing should be *in a judicial proceeding and before a competent jurisdiction.* If it turns out at the trial that the oath was taken before a person who had no lawful authority to administer it, or who had no jurisdiction of the cause the defendant must be acquited.[1]

[*11] **"*The Court.*" *R.* v. *Lloyd.*—In R. *v.* Lloyd (*p*), the prisoner was convicted of perjury, alleged to have been committed in an examination by "the Court" under sect. 27 of the Bankruptcy Act, 1883. It appeared that he was summoned under sect. 27 before a County Court (Liverpool) having jurisdiction in bankruptcy.—The oath was administered to the prisoner in Court by the registrar, but having administered it that official seems to have thought he had done enough. He remained in Court, while the prisoner's examination was conducted in another room. It was held, that there had been no valid examination by "the Court" within the meaning of sect. 27, and that the conviction must be quashed. "A man is brought before the registrar," said Lord Coleridge, C. J., "who under the Act and Rules is the Court. The registrar administers the oath, but ceases to take any active part in what follows. He goes away and transacts other business. The

(*p*) 19 Q. B. D. 213.

[1] Where the party administering the oath had no authority or where there is no jurisdiction, there can be no conviction: Lambert *v.* People, 6 Abbott N. C. 181; Morrell *v.* People, 32 Ill. 499; State *v.* Furlong, 26 Me. 69; U. S. *v.* Bailey, 9 Peters, 238; Comm. *v.* Knight, 274; Arden *v.* State, 11 Conn. 408; Montgomery *v.* State, 10 Ohio, 220.

witness, who according to the Act and Rules, is to be examined before him, is taken to a room, where the examination proceeds in the registrar's absence. What has been called his legal presence is his actual absence. The witness is then indicted for perjury committed before the registrar. But the examination has not been conducted before the registrar." "It is said in the case," said Hawkins, J., "that the registrar was at hand and ready to come if wanted. But this does not disturb the fact that he was not in the room. The examination, which is said to have taken place before him, took place behind his back."

Common law misdemeanor.—As already stated, to constitute the full crime of perjury, the false swearing must have been in a judicial proceeding. But if it has been before some person authorized to administer an oath, though not in a judicial proceeding, *e. g.*, before a surrogate, in order to obtain a marriage licence,—there may be a conviction for a common law misdemeanor (*q*).[2]

Proof of proceedings.—In the recent case of R. *v.* Coles (*r*), it was held by Mr. Justice Stephen at Chester Assizes, that, on the trial of a prisoner for perjury, the indictment preferred at the trial at which the perjury was committed is not sufficient proof of the proceedings there; there must be either the record of the trial, or a certificate of it under 14 & 15 Vict. c. 100, s. 22.

Power to administer oath.—The 16th section of 14 & 15 Vict. c. 99, provides that, "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."[3]

(*q*) R. *v.* Chapman, 1 Den. 432; and see R. *v.* Hodgkiss, L. R. 1 C. C. R. 212, where the prisoner had sworn falsely in an affidavit under the Bills of Sale Acts.

(*r*) 16 Cox, C. C. 165.

[2] Where a deposition was not extra-judical, perjury may be assigned upon it: Stewart *v* State, 22 Ohio, 477.

False swearing to an affidavit not in a judicial proceeding is indictable as a common law misdemeanor: U. S. *v.* Baily, 9 Peters, 238; Dempsey *v.* People, 20 Hun. 261.

The decisions that perjury may be committed before a surrogate to obtain a marriage license are not uniform: R. *v.* Chapman, 1 Denison, 432 *contra.* R. *v.* Alexander, Leach, 74; R. *v.* Foster, Russ. & R. 459.

[3] An oath must be administered by a person duly authorized: State *v.* Dayton, 23 N. J. 49; Comm. *v.* Hughes, 5 Allen, 499; Megregor *v.* State, 1 Ind. 179; State *v.* Powell, 28 Tex. 627.

If the Court has jurisdiction, perjury may be committed although the proceedings are not strictly regular: State *v.* Hall, 7 Blackf. 25; State *v.* Lavelley, 9 Mo.; see U. S. *v.* Babcock, 4 McLean, 113.

It seems that perjury against the United States, which is only indictable under the Acts of Congress and is not a common law offence, cannot be punished in the State Courts: State *v.* Adams, 4 Blackf. 146; People *v.* Kelley, 38 Cal. 145; Rump *v.* Comm., 6 Cas. 475.

[* 12] *Perjury—Materiality.

[8.] **R. *v.* TYSON.**

[L. R. 1 C. C. R. 107 (1867).]

Upon the trial of a man named Sullivan for robbery, on the night of the 13th of April, the prisoner, in support of an *alibi*, swore not only (1) that the prisoner was at home on that night; but (2) that the prisoner had lived in the same house for the last two years; and (3) that during the whole of that time he had not been absent from home for more than three nights. The last two statements were proved to be false, and it was held that they were material,[1] and the proper subjects of assignments of perjury, inasmuch as they tended to render more probable the statement that the prisoner was at home on the night of April 13.

"I was embarrassed at first," said, Lush, J., "but now I am quite satisfied that the allegations on which the prisoner was convicted were calculated to make the jury give a readier credit to the substantial part of his evidence, and therefore became material."

[Metcalfe for Crown.]

Materiality.—Even although there is no doubt about the prisoner's having sworn falsely, or that it was in a judicial proceeding, and before a competent jurisdiction, there remains something else that must be proved against him. It must be shown that what he swore was *material* to the issue being tried:[2] What, then, is "materiality?" "It is here said by my brother Eyre," said Lord Holt, C. J., in a case tried a couple of hundred years ago (*s*), "that the matter in which the perjury is assigned is immaterial to the issue, and therefore no perjury punishable by indictment. But I hold it is *perjury to swear falsely in any circumstance which conduceth to the issue or to the discovery of the truth:* though, if it be only in some impertinent or minute circumstance, as where the witness dined on such a day or the like, which is usual among the vulgar in giving evidence, it is not perjury, because this does *not* conduce to the issue, or to the truth of the matter to be tried." It would be very

(*s*) R. *v.* Greep, Holt, 535.

[1] Evidence as to an *alibi* is material: Comm. *v.* Flynn, 3 Cush. 525.

[2] Matter sworn to must be material, as any facts which establishes the fact in issue: Comm. *v.* Pollard, 12 Met. 225; Comm. *v.* Grant, 116 Mass. 17; or false statements having a direct connection to a material fact as to give weight to the testimony on that point: State *v.* Strat, 1 Murph. 124; State *v.* Norris, 9 N. H. 96; State *v.* Hattaway, 2 Nott. & McC. 118; or swearing falsley to support the testimony of another witness: Wood *v.* People, 39 N. Y. 117; see Salmons *v.* Tart, 31 Ga. 676.

difficult indeed, in point of clearness and accuracy, to improve on this statement of the law.

**A candidate clearing his character.*—The case of R. *v.* Townsend (*t*) [*13] illustrates this branch of the law. There the defendant, who was ambitious of becoming a Doncaster town councillor, found it necessary to prosecute a person, who accused him of having knowingly let a house to a Birmingham prostitute during the race week, for libel. When the case came on before the magistrates, the candidate went into the witness-box and falsely denied all the imputations made against him. Thereupon the tables were turned, and he was himself prosecuted for perjury. It was held, however, that *as magistrates are not entitled to hear evidence as to the truth of a libel* (except where the prosecution is under sect. 4 of 6 & 7 Vict. c. 96, for publishing a libel "knowing the same to be false"), what the defendant had sworn was immaterial to the issue, and he must be acquitted.[3]

R. v. *Gibbon.*—It has been held, in the famous case of R. *v.* Gibbon (*u*), that *perjury may be assigned upon evidence going to the credit of a material witness, although such evidence, being legally inadmissible, ought not to have been received.*[4] The perjury imputed to the defendant in that case was that, on the hearing of an affiliation summons against one of his friends, he had gone into the witness-box and falsely swore that he had himself had connection with the woman about six months before the baby was born. The woman had denied this on cross-examination, and, the question being merely one of credit, her answer ought to have been taken as conclusive on the subject.

R. v. *Mullany.*—In R. *v.* Mullany (*v*), the defendant in a county court case, swore falsely about his name, in consequence of which the Judge, who had already come to the conclusion that the debt was due, refused leave to amend the plaint, and struck out the cause. It was held, that his statements were sufficiently material to sustain a conviction for perjury. "He swore it," said the Court, "in a judicial proceeding *for the purpose of affecting the decision;* and the statement he made was material, because, on the strength of it, the county court judge altered his judgment for the plaintiff into one for the defendant. The case, therefore, clearly comes within the rule laid down in R. *v.* Philpotts (*x*), and R. *v.* Gibbon (*y*). When the question arises, whether false swearing in a judicial proceeding, with intent to mislead is to be free from punishment because it is wholly irrelevant and immaterial to the issue that is being tried, that will be a question for the fifteen judges to decide, *though, for my own part, I should be inclined to hold that*

(*t*) 4 F. & F. 1089.
(*u*) L. & C. 109, overruling R. *v.* Murray, 1 F. & F. 80.
(*v*) L. & C. 593.
(*x*) 2 Den. C. C. 302.
(*y*) L. & C. 109.

[3] It is not perjury, where the matter falsely sworn to does not affect the point in dispute: State *v.* Wall, 9 Yerg. 347; State *v.* Shupe, 16 Iowa, 36; or is absolutely ineffective or is an absolute nullity or superfluous or irrelevant: White *v.* State, 1 Smedes & M. 149.

[4] If false testimony be inadmissible, it may be material: Chamberlain *v.* People, 23 N. Y. 85.

any false swearing in a judicial proceeding, with intent to mislead, whether material or not, would amount to the crime of perjury. That, however, will be a question of importance when it does arise. The present case is clearly governed by the cases referred to."

See also the recent case of R. *v.* Hadfield, 16 Cox, C. C. 148.

[*14] **Compounding Crimes.*

[9.] R. *v.* BURGESS.

[16 Q. B. D. 141 (1885).]

The prisoner was employed to levy a distress for two weeks' rent, amounting to 28s., on the goods of a Mr. Bedford. While in possession, his assistant, Arthur Bagley, helped himself to some of Mr. Bedford's money laid away in a drawer, and absconded. The prisoner, on discovering the the theft, entered into some negotiations with Bagley's family, and finally handed his (Bagley's) mother a document to this effect:—

"*I, W. H. Burgess, undertake not to charge Arthur Bagley with any criminal case that I have now against him on the money being provided to pay what he took from Peckham Road while in possession, viz.*, 30s.

"W. H. BURGESS."

The money was paid to Burgess, but Bagley was nevertheless, on the evidence of Mr. Bedford, convicted summarily of the theft. Burgess was then prosecuted for compounding a felony,[1] and it was held that his conviction was correct, *notwithstanding that he was neither the owner of the goods stolen, nor a material witness for the prosecution.*

[Burnie for prisoner; Poland for Crown.]

Compounding felonies.—To take a reward, which need not be of a pecuniary nature, for refraining from prosecuting a person for a felony, is a misdemeanor punishable by fine and imprisonment.

Compounding misdemeanors.—The compounding of a misdemeanor, how-

[1] An agreement by a party knowing a crime to be committed, not to prosecute or to put an end to a prosecution, in consideration of some peculiar advantage constitutes the offence of compounding crimes: State *v.* Duhammel, 2 Har. (Del.) 532; Bothwell *v.* Brown, 51 Ill. 234; Walls *v.* State, 54 Ind. 561; Comm. *v.* Pease, 16 Mass. 94.

ever, is not an offence, unless the misdemeanor inflicts a public as contrasted with a private wrong (*z*).[2]

Helping person to recover stolen goods. Advertising reward.—Sect. 101 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), provides for the punishment as a felon of the individual who corruptly *takes a reward "under pre- [*15] tence or upon account of helping any person" to get his stolen goods back; and sect. 102 of the same statute makes a person who advertises a reward for the return of stolen property, with a hint that no unpleasant questions will be asked, liable to "forfeit the sum of fifty pounds for every such offence to any person who will sue for the same." The printer and publisher are also liable to this forfeiture, but newspapers are specially protected by a later Act (*a*).

Misprision.—Somewhat analogous to the offence of compounding a felony is that of *misprision of felony.* Misprision of felony is the concealment, or procuring the concealment, of felony, whether such felonies be at common law or by statute. Silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision.[3] If to the knowledge there be added assent, the party will become an accessory. The punishment for this offence is fine and imprisonment; and provisions against the commission of it by sheriffs, coroners, and other officers, are contained in 3 Edw. I. c. 9.

See also Flower *v.* Sadler, L. R. 10 Q. B. D. 572.

Bigamy—Seven Years Rule.

R. *v.* CURGERVEN. [10.]

[L. R. 1 C. C. R. 1 (1865).]

The prisoner was a man-of-war's man, and married one Charlotte

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(*z*) See Keir *v.* Leeman, 9 Q. B. 371; and Whitmore *v.* Farley, 14 Cox, C. C. 617.

(*a*) 33 & 34 Vict. c. 65, s. 3.

[2] Neither a justice of the peace nor a prosecuting attorney nor a witness possesses the power to compromise a felony: Ivinson *v.* Peace, 1 Wyo. 277; see Saxon *v.* Hill, 6 Oreg. 388.

An offence, which in the discretion of the court, may be punished by imprisonment, cannot be compromised: Chandler *v.* Johnson, 39 Ga. 85.

Where an offence is a personal tort, and there is no attempt to suppress the prosecution, it may be compromised: Stancel *v.* State, 50 Ga. 155; see Golden *v.* State, 49 Ind. 424.

The bare taking of one's goods back again or receiving reparation is no offence, if the rights of the public are preserved inviolate: Plummer *v.* Smith, 5 N. H. 553; see Hinesburgh *v.* Summer, 9 Vt. 23–26; Murphy *v.* Bottomer, 40 Mo. 67; Brown *v.* Padgett, 36 Ga. 609; Porter *v.* Jones, 6 Cald. 313; Ford *v.* Cratty, 52 Ill. 313; Bank *v.* Moore, 2 Southard, 470; Corley *v.* Williams, 1 Bailey, 588.

Any attempt to stay the arm of justice, as by suppressing evidence is illegal: Plumer *v.* Smith, 5 N. H. 553; Collins *v.* Blantern, 2 Wils. 341.

[3] To suffer a felony to be committed is misprision of felony: Connaughty *v.* State, 1 Wis. 165, and making no effort to apprehend the offender is a misprision: 1 Russ. on Crimes, 194; see Rev. Stat. of U. S. Sec. 5390.

Curgerven at Buryan, in Cornwall, on September 1st, 1852. In June, 1853, in consequence of some disagreement, his wife left him and returned to her father's house at Buryan. Then the Crimean War broke out, and the prisoner was away from England for years. On July 9th, 1862, being then at a coastguard station at a small place on the Devonshire coast, and never having heard of Charlotte since 1854, he went through the form of marriage with one Eliza Hardy, Charlotte, however, as [*16] it * happened, was alive, and a bigamy prosecution was started. It was held, that the prisoner was entitled to be acquitted; and the rule was stated to be, that upon a trial for bigamy, when it is proved that the prisoner and his first wife have lived apart for the seven years preceding the second marriage, it is incumbent on the prosecution to show that during that time he was aware of her existence.[1]

[No counsel appeared.].

Prisoner not bound to prove negative.—This view of the law was an exceedingly merciful one for the prisoner, for on his return to England he seems to have got married again without taking the slightest trouble to inquire what had become of his first wife. Probably she had been living at Buryan all the time, so that he could easily have found out whether she was dead or alive, if he had liked. But the ground of the decision is that the prisoner in such a case is *not to be called upon to prove a negative* (*b*).

R. v. *Jones.*—In R. *v* Jones (*c*), the leading case was distinguished. The prisoner married one Winifred Dodds in 1865, and they lived together after the marriage. In 1882 he went through the marriage ceremony with one Phœbe Jones, Winifred being still alive. On the trial for bigamy, it was shown that the prisoner had married Winifred, and also that they had lived together; and there was *no evidence at all as to their having ever separated, or as to when if separated, they last saw each other.* This being so, it was held that the facts could not be brought within the case of R. *v.* Curgerven. "There is proof," said Lord Coleridge, C. J., "of the existence of a state of things, and no evidence of the cessation of that state of things; consequently, the

(*b*) See R. *v.* Heaton, 3 F. & F. 819.

(*c*) 11 Q. B. D. 118.

[1] In Massachusetts, a woman is guilty, if she marry within seven years without knowledge of her husband's death: Comm. *v.* Marsh, 7 Met. 473; Newman *v.* Jenkins. 10 Pick. 515.

In North Carolina, an absence of seven years without knowledge of the other being alive, is a defence to a charge of bigamy: State *v.* Patterson, 2 Ired. 346.

In Mississippi, the term is five years: Gibson *v.* State, 38 Miss. 313.

In Pennsylvania, any false rumor, in appearance well founded, of the death of another absent for two years, is a defence: Comm. *v.* Smith, Whart. on Hom. App. 412; for the ordinary seven years' rule: see Innis *v.* Campbell, 1 Rawle, 373;

presumption is that the existing state continued. That presumption could only have been displaced by evidence, and no evidence displacing it was forthcoming.

Presumptionz.—The mere fact that there are no circumstances leading to the inference that the absent party has died, does not raise a presumption of law that such party is alive. The prosecution must satisfy the jury that, as a matter of fact, such party is alive, and it is a question entirely for them. Where the only evidence is that the party was alive more than seven years ago, then there is no question for the jury, and it is a presumption of law that he is dead (*d*).

Honest and reasonable belief.—On an indictment for bigamy, evidence is not (it seems) admissible to show, that the prisoner honestly and reasonably believed that his * first wife was dead when he married a second [* 17] within seven years of his last having heard of, or seen, the first wife (*e*).[1] Such a belief can only be used in mitigation of punishment after conviction.

Bigamy—Invalidity of Second Marriage.

R. *v.* ALLEN. [11.]

[L. R. 1 C. C. R. 367 (1872).]

The prisoner, while his proper wife was yet alive, went through the ceremony of marriage with another woman, who was within the prohibited degrees of affinity, so that, even if the parties had been free, they would have been under a statutory inability to marry one another. It was held that, notwithstanding such inability, the prisoner was guilty of bigamy.[2]

[E. V. Bullen for prisoner; Warry for Crown.]

(*d*) R. *v.* Lumley, L. R. 1 C. C. R. 196; and see R. *v.* Wiltshire, 6 Q. B. D. 366.

(*e*) R. *v.* Bennett, 14 Cox, C. C. 45; but see R. *v.* Moore, 13 Cox, C. C. 544.

[1] A *bonâ fide* belief by the wife that her husband is dead is not a defence for the wife in case of a second marriage: Comm. *v.* Marsh, 7 Metc. 472; see Thompson *v.* Id., 114 Mass. 556; and where the husband has deserted his wife and believed her dead, it was no defence: Reg. *v.* Smith, 14 Up. Can. Q. B. 565.

In Indiana, belief that the wife had been divorced from him was held a defence: Squires *v.* State, 46 Ind. 459.

[2] The offence of bigamy is complete when the form of a second marriage has been gone through with, although such second marriage may be invalid, by reason of some legal disability of the parties: People *v.* Brown, 34 Mich. 339; as from consanguinity or the like. The gist of the offence is entering into a void marriage while a valid one exists: Hays *v.* People, 25 N. Y. 390.

R. v. *Fanning.*—In deciding this case, the Court expressed their disapproval of the Irish case of R. *v.* Fanning (*f*), where a Protestant, having a wife living, had been married by a Roman Catholic priest to a Roman Catholic lady, contrary (even apart from questions of bigamy) to a statute of George II. (*g*). The view of the Irish Court was that, to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage.

Invalidity of First Marriage.—See the recent case of R. *v.* Kay (*gg*), where the prisoner was acquitted on account of the invalidity of the first marriage, through undue publication of banns.

Uttering Counterfeit Coin.

[12.] **R. *v.* HERMANN.**

[4 Q. B. D. 284 (1879).]

The prisoner was indicted for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.[1] The coins, however, were not "false [* 18] * and counterfeit" in the usual way, but were composed of as good gold as ever came out of the Mint. They were *real sovereigns which had been fraudulently filed at the edges* to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely, and, in order to restore the appearance of the coins, a new milling had been made on each coin with tools. It was held that these coins were "false and counterfeit" within the meaning of 24 & 25 Vict. c. 99, s. 9.

"A sovereign from which the milling has been fraudulently re-

(*f*) 10 Cox, C. C. 411.
(*g*) 19 Geo. II. c. 13.
(*gg*) 16 Cox, C. C. 292.

[1] Under the United States Statutes, it is a punishable offence to bring into the United States with intent to pass them, any false, forged, or counterfeit coin: U. S. *v.* Marigold, 9 How. 560; Bank *v.* Van Dyck, 27 N. Y. 450; Legal Tender Cases, 12 Wall. 268.

There is a distinction between counterfeiting and uttering false coin; counterfeiting applies to the act of making, as distinguished from the act of circulating: the former is an offence directly against the government, the latter against the State: Fox *v.* Ohio, 5 How. 410; U. S. *v.* Marigold, 9 Id. 560.

moved," said Pollock, B., "ceases to be current coin, but is *something else intended to resemble* current coin.[2] It is like the case of a man taking part of the gold out of a sovereign, and filling up the hollow left with alloy, and then passing it as genuine."

"These coins," said Lord Coleridge, C. J., "were passed for whole sovereigns, and made so to pass by the operation of giving them false millings."

[Eyre Lloyd for Crown.]

Two eminent dissentients.—It is to be observed, however, that two very eminent judges, viz., Lush and Stephen, JJ., where dissentient in this case, considering that, although the coins had been fraudulently dealt with, they were genuine coins, and not false or counterfeit. Probably the reader will greatly prefer the view of the majority, independently of the advantage which it has of securing the punishment of a swindler.

Passing bad money.—The giving of counterfeit coin to a woman as the price of connection with her is an uttering (*h*),[3] and so, probably, is the giving of bad money in charity, notwithstanding an old decision of Lord Abinger's to the contrary (*i*), for clearly the giver must be presumed to intend that the recipient of his bounty shall put the money in circulation. The same remark applies to the case of a collection in church or at a meeting.

Offering bad money.—It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be *offered* in payment, though the person to whom it is offered refuses it (*j*).

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*Concealing Treasure Trove. [*19]

R. *v.* THOMAS. [13.]

[9 Cox, C. C. 376 (1863).]

An ignorant farmer in Sussex, while ploughing, found some large rings of old gold, worth about £600. Not in the least understanding their value, he sold them to the prisoner for 5*s.* 6*d.*, saying where he found them. The prisoner afterwards found out they were gold, and received from some gold refiners

(*h*) R. *v.* ——, 1 Cox, C. C. 250
(*i*) R. *v.* Page, 8 C. & P. 122.
(*j*) R. *v.* Patrick Welch, 2 Den. 78.

[2] Brightening base pieces of coin, so as to render them capable of circulation, is counterfeiting: Rasnick *v.* Comm., 2 Va. 356.

[3] The offence of passing counterfeit coin is complete even though uttered as base coin or passed at a gambling table: U. S. *v.* Nelson, 1 Abb. C. C. 137; State *v.* Wilkins, 17 Vt. 151; Comm. *v.* Woodbury, Thac. Crim. Cas. (Mass.) 47.

in Cheapside a cheque on Glynn's to the tune of £530. It was held that he was properly convicted of concealing treasure trove from the Crown, and that it is *not necessary to show in such a case that the concealment was fraudulent.* "The whole line of authorities," said Erle, C. J., "satisfies us that it is by no means the essence of the offence that it should be a fraudulent concealment."

[Denman, Q. C., and Hance for Crown.]

Former importance of treasure trove. Toole's case.—In the earlier days of our constitution, the law as to treasure trove was of much greater importance than it is now, and concealment of it was punished with death. In R. *v.* Toole (*k*), it was held that it is not necessary, in an indictment for concealing treasure trove, to allege an inquisition before the coroner, or to show the title of the crown by office found.

Gold and silver mines.—It may be mentioned here, as the subject has attracted some attention lately, that gold and silver mines, when discovered, belong to the Crown; nor need any compensation be paid to the landowner. In the case, however, of gold or silver being found in a base mine (for example, a lead mine), the sovereign must pay a specified price for the ore, if he wants it (*l*). The reason why the king has a right to all the gold and silver mines opened in his dominions, is that he is supposed to need them for the purposes of his coinage.

[*20] ** Conspiracy—Elasticity of Law.*

[14.] R. *v.* ORMAN.

[14 Cox, C. C. 381 (1879).]

Mary Orman and Maria Barber, her mother, were indicted for conspiring together to get a quantity of jewelry and other goods from various Ipswich tradesmen by false pretences and fraud. One of them obtained goods on credit in order to sell them to the other below their value; that other aiding as a referee and giving character. It was held that, *though the acts complained of might not amount to a crime in an individual,* yet that an indictment might lie for conspiracy when they were the result of an agreement between two or more persons.[1]

(*k*) 9 Cox, C. C. 75 (Ir.).
(*l*) See 1 Will. & M. st. 1, c. 30; 5 Will. & M. c. 6; and 55 Geo. III. c. 134.
[1] Conspiracy is a combination of two or more persons, by some concerted

"The getting goods on credit," said Bramwell, L. J., "without meaning to pay for them, may not be unlawful in the sense of being criminal or punishable; but it is not lawful, and it is fraudulent at common law; and, at all events, for several to combine together to enable a person to get goods by means of a false character, knowing that he did not intend ever to pay for them, is surely criminal."

[Blofield, Reeve and Frere for prisoners; Poyser for Crown]

Hissing a play —An act which may be done innocently by individuals separately, may be an offence where several do it in concert.[2] Thus, it is not a crime for a man to go to a theatre to hiss a play, but if half a dozen young fellows, dining together at a restaurant, suddenly agree to go and do it, it is a different matter altogether.[3] They may find in the sequel that they have placed themselves unwittingly and unpleasantly within the grasp of the very elastic law of conspiracy (*m*).[4]

(*m*) See Clifford *v.* Brandon, 2 Camp. 358.

action, to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means: Comm. *v.* Hunt, 4 Metc. 111, Shaw, C. J.

[2] A consulation or agreement between two or more persons to injure or prejudice a third person by improper means, is conspiracy: Comm. *v.* Shooter, 8 Rich. 72.

[3] In the singular case of Gregory *v.* Duke of Newcastle, 6 Man. & Gr. 205, 953 (1844), which has the merit of being amusing, the action was for hissing the plaintiff off the stage in pursuance of a malicious conspiracy. In point of law the conspiracy showed malice but there was no other evidence and the plaintiff could not secure a verdict against one—it was a case of conspiracy or no case at all. Soon after this case was decided in the Common Pleas of England, the Supreme Court of New York laid down the rule that conspiracy is not in itself a cause of action, Nelson, C. J.: "The writ of conspiracy, technically speaking, did not lie at common law in any case, except where the conspiracy was to indict the party, either of treason or felony, by which his life was in danger, and he had been acquitted of the indictment by verdict. All the other cases of conspiracy in the books were but actions on the case. Where the action is brought against two or more as concerned in a wrong done, it is necessary, in order to recover again against all of them, to prove a combination or joint act of all. For this purpose, it may be important to establish the allegation of conspiracy. But, if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such a one had been sued alone. The conspiracy or combination is nothing so far as sustaining the action goes; the foundation of it being the actual damage done to the party:" Hutchins *v.* Hutchins, 7 Hill, 107 –108 (1845).

[4] In Smith *v.* People, 25 Ill. 17 (1860), Caton, C. J., said: "To attempt to limit or extend the law of conspiracy as deducible from the English decisions would be a difficult, if not impracticable task; we may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means; we are not prepared to say where the line can be drawn." In Comm. *v.* Carlisle, Brightly (Pa.), 36 (1821), Chief Justice Gibson used the following language: "A combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly sub-

No rent.—The case of R. *v.* Parnell, Dillon, Biggar, and others (*n*), illustrates his branch of the law. The charge against the defendants, [*21] * some notorious agitators, was that they had conspired to induce agricultural tenants in Ireland to break their contracts with their landlords, and refuse to pay rents. *Fitzgerald, J., on law of conspiracy.*—The law was admirably laid down by Fitzgerald, J., who said, "This law of conspiracy is not an invention of modern times. It is part of our common law; it has existed from time immemorial. It is necessary to redress classes of injuries which at times would be intolerable, and but for it would go unpunished. If the defendants have broken the law in the manner alleged in the information, there is no law of this land by which they could be reached, but by the law of conspiracy. It has been said that this law has been in England entirely disused. But that is untrue; it is a law repeatedly put in force. It is seldom resorted to in political trials, but in a political trial such as the present, if the defendants have broken the law, their offence can only be reached by the common law indictment for conspiracy. Again, a great deal has been said, in the way of illustration, as to conspiracy to effect objects which would not be criminal in themselves, and you were above all referred to the action of trades unions. But *the action of trades unions, which is now regulated by statute, is totally and essentially different* from the charge which is here made against the defendants. Workmen may agree in common not to work, unless they are paid certain prices. The same in the case of the employers of labour. They may agree not to take men into their employment, unless at certain rates, and they are free to do that. But see how different the circumstances are. A man or a body of men may say, 'We will not give our labour, unless we are paid in a certain way;' or a body of employers, 'We cannot give employment profitable to ourselves, unless you work at a certain rate.' How different is the case before us, for the combination alleged here is an agreement to incite farmers, who have agreed to pay certain rents *not to pay* them, and not alone not to pay the rents which they have contracted to pay, but to *keep the farms by force*, and against the law of the country. There is no analogy between the two cases."

R. v. *Howell.*—In R. *v.* Howell (*o*), the prisoners were found guilty upon an indictment which charged them with conspiring to persuade a young girl to become a common prostitute and the conviction was held to be right, because, though common prostitution is not an indictable offence, it is unlawful.[5]

R. v. *Warburton.*—So, in R. *v.* Warburton (*p*), it was held that, although

(*n*) 14 Cox, C. C. 508.
(*o*) 4 F. & F. 160.
(*p*) L. R. 1. C. C. R. 274.

jecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or of mischief."

[5] In the leading American case, Smith *v.* People, it was decided by the Supreme Court of Illinois that a combination to seduce a female was a criminal conspiracy, although seduction was not an offence at Common Law nor by Statute in Illinois, 25 Ill. 17 (1860); see Anderson *v.* Comm., 5 Randolph Va. 627.

it may not be a criminal offence at common law for a person to cheat his partner, yet where one of two partners combines, during the continuance of the partnership, with a third party to enable the one *partner to cheat the other with regard to the division of the partnership property on a contemplated dissolution of the partnership, this combination is a conspiracy (*q*).[6] "A civil wrong," said Cockburn, C. J., "was intended to Lister. The facts of the case fall within the rule that when two fraudulently combine, the agreement may be criminal, although, if the agreement were carried out, no crime would be committed, but a civil wrong only would be inflicted on a third party. In this case the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it was, however, a conspiracy; as the object was to commit a civil wrong by fraud and false pretences." [*22]

Other cases.—The case, however, of R. *v.* Turner (*r*) is usually cited to show that an indictment will not lie for a conspiracy to commit a mere civil trespass. "I should be sorry," said Lord Ellenborough, C. J., "that the cases in conspiracy against individuals, which have gone far enough, should be pushed still further." But in R. *v.* Rowlands (*s*), Lord Campbell, C. J., said plainly, "as to Turner's case I have no doubt whatever that it was wrongly decided." R. *v.* Pywell (*t*), again, where Lord Ellenborough held that an agreement between two persons to give a false warranty to the purchaser of a horse was not the subject of an indictment for conspiracy, appears to have been overruled by R. *v.* Kenrick (*u*).

Conspiracy—must be of Two at least.

R. *v.* MANNING. [15.]

[12 Q. B. D. 241 (1883).]

The defendant Manning and a person named Hannam were indicted at the Winchester summer assizes for conspiring together to cheat and defraud somebody. Lord Coleridge, C. J., tried the case and directed the jury that they might find one prisoner guilty and acquit the other. This was afterwards held to have been a mis-

(*q*) The offence was fully completed before the passing of 31 & 32 Vict. c. 116, by which a partner can be criminally convicted for feloniously stealing partnership property.

(*r*) 13 East, 228.

(*s*) 17 Q. B. 671.

(*t*) 1 Stark, N. P. C. 402.

(*u*) 5 Q. B. 49.

[6] A combination between a member of a firm and a third party to issue the notes of the firm to pay the partner's individual debts is an indictable offence: State *v.* Cole, 10 Vroom, 324 Beasley, C. J.

direction, and the principle was clearly laid down that *where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted.*[1]

[* 23] * "The rule appears to be this," said Matthew, J., "in a charge for conspiracy in a case like this, where there are two defendants, the issue raised is whether or not both the men are guilty, and if the jury are not satisfied as to the guilt of either, then both must be acquitted."

"I have arrived at the same conclusion," said Stephen, J., "with great reluctance, and entirely upon the authority of the passage in O'Connell *v.* The Queen (*v*). The decision of the highest authority, and clearly shows that it is a legal impossibility that, when several persons are indicted for a conspiracy, any verdict should be found which implies that some were guilty of one conspiracy and some of another."

[Charles, Q.C., and Warry for defendant; C. W. Mathews, and the Hon. Bernard Coleridge for Crown.]

Misled by divorce cases.—Lord Coleridge, C. J., in his judgment very candidly admitted that he had been wrong at the trial, having been misled by the practice in the Divorce Court in such cases as Robinson *v.* Robinson and Lane (*x*), and Stone *v.* Stone and Appleton (*y*), which was based on the fact that that which is evidence against one person is by no means necessarily evidence against another.

O'Connell v. *The Queen.*—In O'Connell *v.* The Queen (*v*), referred to above, a count in an indictment charged eight defendants with one conspiracy to effect certain objects, and a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiracy to effect some, and not guilty as to the residue of these objects, was held bad and repugnant; the principle of the decision being that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count, and cannot be separated into parts.

Husband and wife.—It may be mentioned that a man and his wife cannot be indicted for conspiring together alone, because they are in law one person (*z*).[2] But one person alone may be tried for conspiracy, provided the

(*v*) 11 Cl. & F. 155.
(*x*) 1 Sw. & Tr. 362.
(*y*) 3 Sw. & Tr. 608.
(*z*) 1 Hawk. c. 72, s. 8.

[1] The fact of confederating is the gist of the offence: People *v.* Fisher, 14 Wend. 9.

Two, at least, must be concerned in it; one cannot be convicted in an indictment against two without conviction of both; one cannot be acquitted without the acquittal of both: State *v.* Tom, 2 Devx. (N. C.) 569; *contra* Hutchins *v.* Id., 7 Hill, 107; see note to p. 20.

[2] A man and his wife, being in law but one person, cannot be convicted of conspiracy, unless other parties are charged: State *v.* Covington, 4 Ala. 603; see Comm. *v.* Manson, 2 Ash. (Pa.) 31, (1833.)

indictment charges him with conspiring with others who have not appeared (*a*), or who are since dead (*b*).[3]

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* *Lunatics.* [*24]

R. *v.* BISHOP. [16.]

[14 Cox, C. C. 404 (1880).]

The defendant was indicted under 8 & 9. Vict. c. 100, s. 44, for receiving two or more lunatics into a house not duly licensed or registered. Her practice had been to advertise for patients suffering from "hysteria, nervousness, and perverseness." It was held that, although she honestly and reasonably believed that none of her patients were "lunatics," she might nevertheless be convicted.

[Mellor, Q.C., and Harris for Crown.]

Ill-treatment of lunatics. Husband. Brother. Parents.—Lunatics are protected against ill treatment by various statutes. 16 & 17 Vict. c. 96, s. 9, for instance, makes it a misdemeanour for "any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital, or licensed house, or any person having the care or charge of any single patient," to abuse, ill-treat, or wilfully neglect such patient. It was held in R. *v.* Rundle (*c*), that a husband could not be convicted under this section (*c*), because it was not intended to apply to persons whose care or charge arose from natural duty. But in R. *v.* Porter (*d*), where a man voluntarily took upon himself the care and charge of a lunatic brother in his own private house, he was held to be liable to be indicted for ill-treating him under the above statute (*d*). "The statute," said Pollock, C. B., "was not intended to interfere with persons in the relation of husband and wife, but a brother has no legal control over a brother." In the recent case, however, of Buchanan *v.* Hardy (*e*), the principle of Rundle's case (*f*) was questioned,

(*a*) R. *v.* Kinnersley, 1 Str. 193.
(*b*) R. *v.* Nicholls, 2 Str. 1227.
(*c*) 1 Dears. 432.
(*d*) L. & C. 394; and see R. *v.* Smith, 14 Cox, C. C. 398.
(*e*) 18 Q. B. D. 486.
(*f*) 1 Dears. 432.

[3] Where three persons were engaged in a conspiracy, and death ensued before trial, it was held that they could be tried and convicted: People *v.* Olcott, 2 John. Cas. 301; or one can be convicted who has been indicted with persons unknown: Turpin *v.* State, 4 Black. 72; State *v.* Allison, 3 Yerg. (Tenn.) 428; People *v.* Howell, 44 Johns. 296; Comm. *v.* Manson, 2 Ash. 31; Comm. *v.* Irvine, 8 Phila. 380.

and it was held, that the parents of a lunatic who resides with them under their care, are persons "having the care or charge" of a lunatic within the section, and may be convicted under it. "I am of opinion," said Lord Coleridge, C. J., that the case of R. *v.* Rundle (*f*), if it is an authority at all, can only be held to be a binding authority in the case of a husband and wife. . .

I cannot say that the reasons given in R. *v.* Rundle (*f*) are satisfac-
[*25] tory to * my mind nor do I think that Pollock, C. B., was satisfied with them when he had occasion to re-consider them in R. *v.* Porter (*g*). The principle which must be adopted is that if any person has the care or charge or custody of a lunatic, and in the course of that custody he in any way abuses, ill-treats, or wilfully neglects that lunatic, then, *whether the custody be or be not what has been called 'domestic custody,'* the person so ill-treating, &c. the lunatic, comes within 16 & 17 Vict. c. 96, s. 9."

Idiots.—The Idiots Act, 1886 (49 & 50 Vict. c. 25), contains provisions for the care and education of persons coming under that description. The difference, it may be remarked, between an idiot and a lunatic is, that the former is a person born without a mind, while the latter is one who had one once, but has lost it.

As to the defence of insanity in criminal cases, see p. 101.

Obstructing Trains.

[17.] **R. *v.* HADFIELD.**

[L. R. 1 C. C. R. 253 (1870).]

A drunken man unlawfully altered some railway signals at a station on the M. S. & L. line in Cheshire. The alteration caused a train, which would have passed the station without slackening speed, to come nearly to a stand. Another train going in the same direction, and on the same rails, was due at the station in half an hour. It was held that the prisoner had "obstructed" a train within the meaning of sect. 36 of 24 & 25 Vict. c. 97.

"I think," said Kelly, C. B., "that there was as much an obstruction as if a log of wood had been placed across the rails. There was a direct obstruction, which I think is within the words as well as the spirit of the section."

"There is nothing in sect. 36," said Blackburn, J., "to
[*26] * show that the obstruction must be a physical one. It is sufficient if a train is in fact obstructed."

[Horatio Lloyd for Crown.]

(*f*) 1 Dears. 432. (*g*) L. & C. 394.

Holding up arms like an inspector.—Baron Martin, however, dissented from the view of the majority, considering it to be straining the meaning of the section to hold that stopping a train by changing the signals was an "obstruction."

The leading case was followed in R. *v.* Hardy (*h*), where, as a train was approaching, the prisoner had held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations.[1]

Abduction of Girls under Sixteen.

R. *v.* PRINCE. [18.]

[L. R. 2 C. C. R. 154 (1875).]

At the Kingston Assizes in 1875, the prisoner was convicted under 24 & 25 Vict. c. 100, s. 55, of having unlawfully taken an unmarried girl, under the age of sixteen, out of the possession and against the will of her father. Although the girl was only fourteen, she looked eighteen, and she had told the prisoner that that was her age, an assertion which he had fully believed. It was held, in spite of these facts, and of the girl's having gone with the prisoner quite willingly, that the conviction was right.

[Lilley for Crown.]

Under lawful care.—Although it is no defence that the accused really and reasonably supposed the girl to be over sixteen, yet it is necessary for the prosecution to show that he had good reason for believing her to be *under the lawful care or charge* of her father, mother, or some other person.[2] *Picking up girl in street.*—The man who picks a girl up in the streets, and takes her off somewhere, is not expected to know that she has got a father or mother, nor need he make any inquiries on the subject (*i*).

* *Girl's willingness no defence. Leaving home without persuasion.*—The [*27] accused cannot secure his acquittal by showing that the girl went with him gladly and willingly, or even that she was herself the proposer and prompter of the scheme (*k*). If, however, she left her home without any kind of help or persuasion from the defendant, he is not to be convicted of

(*h*) L. R. 1 C. C. R. 278.
(*i*) R. *v.* Hibbert, L. R. 1 C. C. R. 184.
(*k*) R. *v.* Mankletow, Dears. 159; and R. *v.* Robins, 1 C. & K. 456.

[1] An indictment cannot be maintained against a passenger for pulling a signal rope attached to a bell on the engine: Comm. *v.* Killian, 109 Mass. 345.

[2] If the female be under age and without parents or legal guardian, those who have her under their care will be deemed to have the legal charge of her: State *v.* Ruhl, 8 Iowa, 447.

abduction merely because he received her when she came to him (*l*).[2] But if at any time he has attempted to induce her to leave home without her parent's consent, and she afterwards does so, he is guilty of abduction if he receives her, even though he disapproves of the act at the particular time at which she gives effect to his previous persuasions (*m*).

Purity of motive no defence. Rescuing from convent.—Again, the absence of a corrupt motive is no answer to a charge of abducting a girl under sixteen. The intent to marry or carnally know is not an ingredient in the offence under sect. 55. The accused may have acted from the highest and purest motives, but his having done so is no defence. Thus, in a case tried at Stafford Assizes in 1872 (*n*), it appeared that the defendant was a married man of excellent character, and it was vigorously contended for him by his counsel (the redoubtable Dr. Kenealy) that, actuated by religious and philanthropic motives, he had taken the girl from her parents simply to save her from being buried alive in a convent. The Court, however, said that even if all that were true, it did not constitute a defence. "His motives, his philanthropy, and the fact that she was willing to go," said Mr. Justice Quain to the jury, "have nothing to do with the question before you. . . What right has a man to go into his neighbour's house and interfere between a child and parents who are by nature the proper persons to protect their offspring? Even if the father had wished to place her in a convent, what was that to the prisoner? Are there no magistrates and officers of the law to whom the girl might appeal if her father exerted his authority wrongfully?"

Marrying girl of fifteen.—In R. *v.* Baillie (*o*), the prisoner had induced a young girl under sixteen to go with him to a Roman Catholic chapel, where they were married. The child was only away from home about an hour, and after her return continued to live with her parents as before, they being quite unaware of the fact that she was a married lady. The marriage had not been consummated. It was held that the prisoner was guilty of abduction, because the effect of what he had done was to alter the girl's whole relationship to her father, and to give himself power to take her away whenever he liked.

[* 28] * *Abducting girl under eighteen with criminal intent.*—Sect. 7 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), makes it a misdemeanor punishable, as a maximum, with two years' imprisonment with hard labour to abduct an unmarried girl under eighteen with intent that she should be carnally known. See, however, R. *v.* Henkers (*p*), R. *v.* Miller (*q*), and R. *v.* Packer (*r*), as to the construction of this section, which is not intended to punish a man who is deceived as to a girl's age.

(*l*) R. *v.* Olifier, 10 Cox, C. C. 402.
(*m*) *Ibid.*
(*n*) R. *v.* Walter Booth, 12 Cox, C. C. 231.
(*o*) 8 Cox, C. C. 238; and see *Ex parte* Barford, 8 Cox, C. C. 405, as to father's right to custody of female child under sixteen.
(*p*) 16 Cox, C. C. 257.
(*q*) 13 Cox, C. C. 179.
(*r*) 16 Cox, C. C. 57.

[2] In California the gist of the action is the intent to conceal or detain: People *v.* Cliu Quong, 15 Cal. 332.

Stealing Children under Fourteen.

R. *v.* JOHNSON. [19.]

[15 Cox, C. C. 482 (1884).]

The prisoner was indicted under 24 & 25 Vict. c. 100, s. 56, for the unlawful detention of a little girl under fourteen years of age. The evidence was that she had been in the prisoner's service, and was missing. The prisoner gave different accounts about what had become of the child, but implying that she had given her up to some third persons. It was held that she was rightly convicted, because, whether her stories were all utterly false, or whether the child was in the actual custody of some third parties to whom she had wrongfully delivered her, it was equally true that she had unlawfully detained the child by fraud.

"If the prisoner," said Stephen, J., "having got the child, kept her with the intention of handing her over to some one else, and did so against the will of the parent, that is a detention: and, as she did it by means of falsehoods, the detention was fraudulent." [1]

[Dickens for prisoner.]

Jones v. *Dowle.*—In arriving at this decision, the Court followed a case of Jones *v.* Dowle (*s*), which was an action of detinue for a picture. The plaintiff had bought it at a sale by auction, but the defendant, the auctioneer, had delivered it under a supposed contract of sale to a third party. "Detinue," said Parke, B., "does not lie *against him who *never* [*29] *had* possession of the chattel, but it does against him who once had, but has improperly parted with, the possession of it."

Leading the blind.—The 56th section does not apply to the case of force or fraud exercised merely on the gauardian of the child nor on any other person other than the child itself. See R. *v.* Barrett (*t*) where a little boy of ten took a strange fancy to a blind man and ran away from school in order to lead him about from place to place up and down the country. "I did not entice him away," said the blind man, "the child wished to go." This was admitted by the prosecution and it was held accordingly that the prisoner had not committed the offence provided for by the section

Distinction—Stealing a child under fourteen (sect. 56) is a felony punishable with a maximum of seven years' penal servitude, whereas the abduction of a girl under sixteen (sect. 55) is only a misdemeanor, and cannot be punished with more than two years' imprisonment with hard labour,

(*s*) 9 M. & W. 19. (*t*) 15 Cox, C. C. 658.

[1] Exciting fear by threats, fraud, is a coercion of the will and is sufficient without physical force to constitute kidnapping: Moody *v.* People, 20 Ill. 315.

Abandoning Baby.

[20.] **R. *v.* FALKINGHAM.**

[L. R. 1 C. C. R. 222 (1870).]

Mary Falkingham was the mother of an illegitimate child, which, when it was five weeks old, she carefully packed in a hamper, and sent, labelled "with care," to the address of the father, who, of course, was not expecting such a surprise. The parcel was delivered at the father's address in about an hour, and, when opened, the baby was discovered very much in its usual state of health. Inside the parcel was also a piece of paper, on which was written, "*Please take care of this child, for George Beaumont is the father of it.*" It was held that the prisoner came within the meaning of 24 & 25 Vict. c. 100, s. 27, which [*30] *provides that, "Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been, or shall be, likely to be permanently injured, shall be guilty of a misdemeanor."

[No counsel appeared.]

Actual custody unnecessary—In R. *v.* White (*q*), the facts were these; a woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child, on the 19th of October, and left it at the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door, and subsequently in the roadway, from about 7 p.m. till 1 a.m., when it was removed by a constable, the child then being cold and stiff. It was held that, though the father had not had the actual custody and possession of the child, yet as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child, whereby its life was endangered within the meaning of the statute. "If the child had died," said Blackburn, J., "a jury might have convicted him of murder."[1]

(*q*) L. R. 1 C. C. 311.

[1] If a helpless child's death result from an unjustifiable exposure to the weather, it is murder; Shannon *v.* People, 5 Mich. 71.

Concealment of Birth.

R. *v.* ELIZABETH BROWN. [21.]

[L. R. 1 C. C. R. 244 (1870).]

The prisoner was accused of endeavouring to conceal the birth of her child by secretly disposing of its dead body. She had put it over a wall four and half feet high, dividing the yard of a public house from a field, into the field, and there it was found by a little girl wandering about gathering wild flowers. No one going into the field in the course of his ordinary occupation would have gone near the body or would have seen it; nor was there * any kind of path across the field. [*31] People on the yard side of the wall could not have seen the body unless they had gone right up to the wall and looked over. There was blood on the wall and the body was lying on its face quite naked and not covered by anything. It was held that there was evidence to go to the jury of a "secret disposition" of the body under sect. 60 of 24 & 55 Vict. c. 100.[1]

"It seems to me," said Bovill, C. J., "that what is a secret disposition must depend upon the circumstances of each particular case. *The most complete exposure of the body might be a concealment.* As, for instance, if the body were placed in the middle of a moor in the winter or on the top of a mountain, or in any other secluded place where the body would not be likely to be found. There would in such a case, be a secret disposition of the body, and the jury must say in each case whether or not the facts show that there has been such a disposition.

[Ridley for Crown.]

Open box in bedroom—In R. *v.* Sleep (*r*) it was held by Byles, J., at Exeter Assizes, that a mother who placed the dead body of her child in an open box in her bed-room, and afterwards, on inquiry by the doctor, told him where it was, could not be convicted of concealment. "The concealment," said the judge, "must be by a secret disposition of the body, and a disposition can only be secret by placing it where it is not likely to be found. Secrecy is the essence of the offence. Can you say that an open box in the prisoner's bedroom is a secret disposition? It is for you to say, but in my opinion it is not."

(*r*) 9 Cox. C. C. 559.

[1] The offence of concealing the death of a bastard child consists in concealing the death of a human being upon which the crime of murder could be committed: State *v.* Jones, 4 Hawks, 350.

Exposing body in street.—In a recent case (*s*) on the North Eastern circuit at Durham, it was held by Denman, J. (after consulting Day, J.), that a woman who exposed the naked and mutilated dead body of her child in a public highway (one of the back streets of the city) along which many people were certain to pass and re-pass, was guilty of a nuisance at common law.

Fœtus.—The expression "delivered of a child" in sect. 60, does not [*32] include delivery of a fœtus which has not reached the period at * which it might have been born alive (*t*). But a fœtus not bigger than a man's finger, but having the shape of a child, is within the statute (*u*).[1]

Burning Dead Bodies.

[22.] **R. *v.* STEPHENSON.**

[13 Q. B. D. 331 (1884).]

A girl at Cayton, near Scarborough, was delivered of an illegitimate child which died three weeks afterwards. The girl and her mother then took the dead body of the child and burnt it, their object being to prevent the coroner from holding an inquest. It was held that they were guilty of a misdemeanor. "No case that has been referred to," said Grove, J., "is absolutely in point, but there are many cases which show that interference with statutory duties, and the preventing of their performance, is a misdemeanor in general at the common law. It is so in cases where statutory provisions are, as here, for the public benefit, and especially where, as here, the matter is one concerning life and death. It is most important to the public that a coroner, who, on reasonable grounds, intends to hold an inquest, should not be prevented from so doing."[2]

[Stuart Wortley and H. G. Taylor for defendants; Meek for Crown.]

(*s*) R. *v.* Clarke, 15 Cox, C. C. 171.
(*t*) R. *v.* Berriman, 6 Cox, C. C. 388.
(*u*) R. *v.* Colmer, 9 Cox, C. C. 506.

[1] The child must be born alive, for where the child was *stillborn*, there is no crime in concealing its birth: State *v.* Kirby, 57 Me. 30; see Douglass *v.* Comm., 8 Watts, 538; Boyles *v.* Comm., 2 S. & R. 40; Comm. *v.* Clark, 2 Ash. 105.

[2] By the American common law, it is a misdemeanor for one to bury the body of one who died a violent death, before or without a coroner's inquest: State *v.* McClure, 4 Blackf. 328; Comm. *v.* Cooley, 10 Pick. 37; Comm. *v.* Slack, 19 Id. 304.

R. v. *Price.*—In connection with the leading case, and the law relating thereto, the reader should refer to Mr. Justice Stephen's charge to the grand jury in R. *v.* Price (*x*), where the prisoner was charged with attempting to burn the body of his child instead of burying it, and with attempting to burn the body with intent to prevent the holding of an inquest upon it. "After full consideration," said the * learned judge, "I am of [*33] opinion that a person who burns instead of burying a dead body does not commit a criminal act unless he does it in such a manner as to amount to a public nuisance at common law."

Disinterring corpses.—It may be mentioned here that it is a misdemeanour at common law to remove without lawful authority a corpse from a grave,[2] whether in a churchyard or in the burial ground of a congregation of Protestant dissenters; and it is no defence to such a charge that the motives of the defendant were pious and laudable (*y*).

Leaving corpses unburied.—The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is also an indictable misdemeanour if his ability to provide such burial can be shown (*z*).[3]

Public Indecency.

R. *v.* CRUNDEN. [23.]

[2 Camp. 89 (1809).]

It is an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses from which he may be distinctly seen, although these houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question.[4]

(*x*) 12 Q. B. D. 247.
(*y*) R. *v.* Sharpe, Dears. & B. 160; and see R. *v.* Feist, Dears. B. 590.
(*z*) R. *v.* Vann, 2 Den. 325.

[2] At the common law, it is a crime to wantonly or illegally disturb a corpse without the consent of the deceased in his lifetime or his near relatives since his death: Tate *v.* State, 6 Blackf. 110; Comm. *v.* Loring, 8 Pick. 370; Comm. *v.* Marshall, 11 Id. 350; see Rousseau *v.* Troy, 49 How. Prac. 492.

[3] One whose duty it was to have a dead body buried, and who refused or neglected so to do or prevented such burial, at the common law was guilty of a misdemeanour: Kanavan's Case, 1 Me. 226.

[4] Whatever openly and publicly outrages decency and is injurious to the public morals is a misdemeanour at the common law: Comm. *v.* Sharpless, 2 S & R. 91; McJunkin *v.* State, 10 Ind. 140; Comm. *v.* Holmes, 17 Mass. 336; State *v.* Avery, 7 Conn. 267; Knowles *v.* State, 3 Day, 103.

"I can entertain no doubt," said M'Donald, C. B., "that the defendant, by exposing his naked person on the occasion alluded to, was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals. Nor is it any justification that bathing at this spot might a few years ago be innocent. For [*34] anything that I know, *a man might a few years ago have harmlessly danced naked in the fields beyond Montague House; but it will scarcely be said by the learned counsel for the defendant that anyone might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced."

[Marryat for prisoner; Shepherd, Serjeant, and Gurney for Crown.]

Sir Charles Sedley.—This case has special right to rank as a "leading" case, because, as the Court remarked, it was "the first prosecution of the sort in modern times." The reporter, in a foot-note, says: "The only case resembling this to be found in the books is R. *v.* Sir Charles Sedley" (*a*), where the defendant, as Keble puts it, "was fined 2,000 marks, committed without bail for a week, and bound to his good behaviour for a year, on his confession of information against him for showing himself naked in a balcony, and throwing down bottles (pist in) *vi et armis* among the people in Covent Garden, *contra pacem* and to the scandal of the Government." It appears from this account of his case that the unworthy baronet was punished quite as much for throwing the bottles about as for indecency, so that prosecutions of the kind with which the leading case deals, may be said to have begun with the nineteenth century.

Public morals. The morals of an individual.—The principle of the leading case is that *whatever openly outrages decency, and is injurious to public morals, is a misdemeanour at common law.* If, on the other hand, the indecency is committed in secret, and is only calculated to injure the morals of an individual, it is not indictable unless by statute, as, for instance, under the 11th section of the Criminal Law Amendment Act, 1885. An indecent exposure, though in a place of public resort, if visible only by one person, is not indictable as a common nuisance (*b*).

Roof of house.—A "public place" does not mean a public highway, but simply a place which is open to the view of people generally, even although it may not be visible from any highway.[2] See R. *v.* Thallman (*c*), where

(*a*) 1 Keb. 620.
(*b*) R. *v.* Webb, 1 Den. 338; R. *v.* Watson, 2 Cox. C. C. 376.
(*c*) L. & C. 326.

[2] As to what constitutes a public place in offences against public decency: People *v.* Bixby, 67 Barb. 221; 4 Hun. 636; Campbell *v.* State, 17 Ala. 369; Taylor *v.* State, 22 Ala. 15.

the prisoner indecently exposed himself on the roof of a house in Albemarle Street, Piccadilly, with the object of exciting some female servants in a house opposite. "Surely," said Martin, B., "if the people in twenty or thirty houses round could see it, it is a sufficiently public place."

Public place.—But it would seem, from the opinions expressed in the latest *important case on the subject, that it is not now neces- [*35] sary for the prosecution to show that an act of indecency which was committed before several persons was committed in a public place (*d*).

Booth on race course.—In R. *v.* Saunders (*e*), the defendants were held to have committed an indictable offence by keeping a booth on Epsom Downs for the purpose of an indecent exhibition which anybody who paid was allowed to see;[3] and in R. *v.* Grey (*f*), a herbalist, who had exhibited in his shop-window in the High Street at Chatham, a picture of a man naked to the waist, and covered with eruptive sores (*g*), so as to constitute an offensive and disgusting exhibition, was held guilty of a nuisance, although there was nothing immoral or indecent in the picture, and his motive was innocent.[4] "There is no doubt," said Willis, J., "the exhibition of the picture on a highway is a nuisance. It is so disgusting that it is calculated to turn the stomach." See also R. *v.* Clark (*gg*).

Summary conviction.—It is to be observed that the indecent exposure of the persons[5] may sometimes be punished summarily as well as on indictment. The 4th section of 5 Geo. 4, c. 83, treats "every person wilfully, openly, lewdly and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female," as a *rogue and vagabond*, and gives a bench of magistrates power to send him to prison for three months with hard labour. If a man who has been convicted of the above offence under the above section repeats the act of indecency, he becomes an *incorrigible rogue*, and the Quarter Sessions have power not only to send him to prison, but to have him soundly whipped.

(*d*) R. *v.* Welland, 14 Q. B. D. 63.

(*e*) 1 Q. B. D. 15.

(*f*) 4 F. & F. 73.

(*g*) The herbalist had two pictures in his window, both coloured and life size, one representing the disease—as bad as it could be made,—and the other the perfect cure, which of course, his medicines would effect.

(*gg*) 15 Cox, C. C. 171.

[3] Every public show which outrages decency, shocks humanity, or is contrary to good morals is indictable: Pike *v.* Comm., 2 Duvail, 89; Jacks *v.* State, 22 Ala. 73.

[4] Public exhibitions of obscene pictures or prints and writings is indictable: Comm. *v.* Holmes, 17 Mass, 336; Comm. *v.* Landis, 8 Phila. 453; Willis *v.* Warren, 1 Hilt. 590.

[5] As to questions of the indecent public exposure of one's person or the person of another: Miller *v.* People, 5 Barb. 203; Britian *v.* State, 1 Humph. 203; State *v.* Roper, 1 Dev. & Bat. 208.

Keeping Disorderly House.

[24.] **R. *v.* RICE AND WALTON.**

[L. R. 1 C. C. R. 21 (1866).]

The defendants, as master and mistress, resided in a house at Chester to which men and women resorted for [* 36] * the purpose of prostitution, but no indecency or disorderly conduct was preceptible from the exterior of the house. It was held that they were guilty of keeping a disorderly house.[1]

[No counsel appeared.]

Kind of proof requisite.—The keeping of a bawdy house is a common nuisance, both on the ground of its corrupting public morals, and of its endangering the public peace by drawing together dissolute persons.[2] Though the charge in the indictment is general, yet evidence may be given of particular facts, and of the particular time of these facts. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment.

Reward obtainable.—The proceedings in prosecutions against bawdy houses are facilitated by the statute 25 Geo. 2, c. 36, the 5th section of which stimulates the activity of British citizens in the cause of morality by promising the prosecutors (being "two inhabitants of any parish or place, paying scot and bearing lot therein") a substantial reward if they can run the bawdy house keeper in;—"and in case such person shall be convicted of such offence the overseers of the poor of such parish or place shall forthwith pay the sum of ten pounds to each of such inhabitants; and in case such overseers shall neglect or refuse to pay . . . . upon demand the said sum of ten pounds, such overseers, and each of them, shall forfeit to the person entitled to the same double the sum so refused or neglected to be paid." The enterprising inhabitants, however, if they want to get their £10 each, must be careful to comply with the conditions not only of this section, but also of sect. 7 of 58 Geo. 3, c. 70. See, also, sect. 13 of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885, which authorizes summary proceedings against brothel keepers, whether managers, assistants, tenants, occupiers, landlords, or agents. Even on a first conviction a defendant may, under this section, be sent to prison for three months with hard labour, and without the option of a fine.

[1] A house of ill fame is a house of prostitution and there need be no outward indecency or disorder to constitute the misdemeanour: Comm. *v.* Garrett, 1 Allen, 7; Sylvester *v.* State, 42 Texas, 496.

[2] All disorderly houses are public nuisances: Comm. *v.* Pray, 13 Pick. 359; Bloomhuff *v.* State, 8 Blackf. 205; State *v.* Bailey, 1 Frost (N. H.), 343; even though not *lucri causa:* Comm. *v.* Wood, 97 Mass. 225; State *v.* Williams, 1 Vroom. 102.

Search warrants.—The 10th section of the act just referred to authorizes a justice of the peace to issue a search warrant in any case where there is "reasonable cause to suspect" that a girl is being "unlawfully detained for immoral purposes by any persons in any place within the jurisdiction of such justice." It has been held, Hope *v.* Evered, that this section vests in the justice a judicial as well as a ministerial function, so as to protect a *bonâ fide* applicant against an action for malicious prosecution (*h*).

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* *Homicide—Necessity.* [*37]

R. *v.* DUDLEY AND STEPHENS. [25.]

[14 Q. B. D. 273 (1884).]

Two men and a boy of seventeen were cast away in a storm on the high seas, 1,600 miles from the Cape of Good Hope, and compelled to put into an open boat, having no water and hardly any food. On the twentieth day, to prevent themselves from dying of starvation, the two men killed and eat the boy. It was held that, notwithstanding their extremity, they were guilty of murder.[1]

"It is not needful," said Lord Coleridge, C. J., "to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen Was it more necessary to kill him than one of the grown men? The answer must be 'No.'

> 'So spake the Fiend, and with necessity;
> The tyrant's plea, excused his devilish deeds.'

(*h*) Hope *v.* Evered, 16 Cox, C. C. 112.

[1] To excuse homicide, one must act under an honest, well founded belief that it is necessary to take life to save life, and to justify it there must be an imperious necessity to take life to prevent a felony or great bodily harm: Williams *v.* State. 3 Heisk. 37, 376; Rippy *v.* State, 2 Head. 217; Jackson *v.* State, 6 Bax. (Tenn.) 457; Oliver *v.* State, 17 Ala. 587; People *v.* Hurley, 8 Cal. 390.

It is not suggested that in this particular case the deeds were 'devilish,' but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime."

[A. Collins, Q.C., H. Clark, and Pyke for prisoners; Sir H. James, A.-G., A. Charles, Q.C., C. Mathews, and Dankwerts for Crown.]

The old plank story.—A dictum of Lord Bacon's is often quoted, to [*38] the effect that, *supposing two persons who have been shipwrecked get on to the same plank, and then find it will not bear both, either of them is justified in shoving the other off, and is not responsible if his friend gets drowned in consequence; self-defence and unavoidable necessity being said to be sufficient excuse. This, however, is not the law now, and probably never was.

Self-defence.—But homicide is excusable if a person takes away the life of another in defending himself, supposing the fatal blow which takes away life to be really necessary for his preservation.[2] Not only that, but master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused, the act of the relation assisting being construed the same as the act of the party himself. A sad case occurred at Whitney three or four years ago. *Killing father to save mother.*—The father of the family took to drinking, and then, without any reason, got possessed with the idea that his wife was unfaithful to him, and frequently threatened to murder her. He was on one occasion apparently going to carry out his threat when their son, a young fellow of two and twenty, shot him dead. Mr. Justice Lopes, who tried the case, told the jury that if the young man, at the time he fired the shot, honestly believed, and had reasonable grounds for believing, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then the prisoner ought to be acquitted; which was done (*a*).[3]

Mr. Justice Stephen, in his "Digest of the Criminal Law," p. 19 says:—

Real necessity.—"An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the evil inflicted by it was not disproportionate to the evil avoided."

And he gives the following illustration:—

(*a*) R. *v.* Rose, 15 Cox, C. C. 540.

[2] Self-defence will justify one in defending those with whom he is associated, and in killing, if he believes life is in danger: State *v.* Westfall, 49 Iowa, 328.

[3] The principle of self-defence applies peculiarly to the relation of parent and child, and of husband and wife: Waybright *v.* State, 56 Ind. 123; Sharp *v.* State, 19 Ohio, 379.

Deposing governor.—"A., the governor of Madras, acts toward his council in an arbitrary and illegal manner. The council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the council were the only means by which irreparable mischief to the establishment at Madras could be avoided" (*b*).

* *Necessity of hunger.*—Another illustration which might be given is [* 39] that of a man dying of starvation who helps himself to a loaf from a baker's shop. If his necessity was extreme, his doing so would not be stealing either morally or legally.

Homicide—Real cause of Death.

R. *v.* PYM. [26.]

[1 Cox, C. C. 341 (1846).]

A duel was fought with pistols between the prisoner and another gentleman, and the prisoner gave his adversary a bad wound. An operation was considered by competent medical advisors to be necessary, and was performed with proper skill, but the injured man sank under it. It was held that, *notwithstanding that the immediate cause of death was the operation*, the prisoner was nevertheless guilty of murder.[1]

[Cockburn and Kinglake, Serjt., for prisoner; Rawlinson and M. Smith for Crown.]

Kick or brandy?—In R. *v.* McIntyre (*c*), where the prisoner was indicted for the murder of his wife by kicking her, Coleridge, J., held that it would not help the prisoner if the eveidence showed that the woman had really died from the effects of some brandy which had been administered to her by a surgeon after the kicking, and which had gone the wrong way into the lungs. "This," said the judge, "is like a case where a dangerous wound has been given, and an operation is performed of which the person dies."[2]

(*b*) R. *v.* Stratton, 21 S. & T. 1045.

(*c*) 2 Cox, C. C. 379; and see R. *v.* Davis, 15 Cox, C. C. 174.

[1] If a medical practitioner, following the usual course of practice, occasions death when endeavoring to heal a wound, he who inflicted the wound is still responsible: Comm. *v.* Green, 1 Ash. 289; Hoofman *v.* Comm., 10 Bush. 495; Comm. *v.* Costly, 118 Mass. 1; Comm. *v.* McPike, 3 Cush. 181; McAllister *v.* State, 17 Ala. 434.

[2] The cases in the American law differ as to the responsibility for death resulting from neglect of a wound inflicted by another. If death is produced, the party inflicting it is liable for the consequences, although by the exercise of prudence or care or with better treatment the deceased might have recovered: Bowles *v.* State, 58 Ala. 335; Comm. *v.* Hackett, 2 Allen, 136; U. S. *v.* Warner, 4 McLean, C. C. 463; *contra* Harvey *v.* State, 40 Ind. 516.

Refusing to undergo operation.—In R. *v.* Holland (*d*), the prisoner was indicted for the murder of a man named Garland. It appeared that the prisoner had waylaid and assaulted the deceased, cutting him severely across one of his fingers with an iron instrument. The deceased in all probability would not have died if he had submitted to the amputation of his finger. As, however, he would not, lock-jaw came on and caused death. It was held that the obstinate refusal of the deceased to submit to proper surgical treatment, by which the fatal result would have been prevented, was no defence.

[*40] * *Diseased already.*—So, if the evidence is that a person's death was hastened by the treatment he received from the prisoner, it is no defence that the former was already so diseased that he could not have lived much longer (*e*).[3]

Frightening infant in arms.—Where the prisoner, in unlawfully assaulting a woman who had an infant of four months old in her arms, so frightened the child that it had convulsions, from the effects of which it eventually died in about six weeks, it was held that he was guilty of manslaughter, if the jury thought that the assault on the woman was the direct cause of death (*f*).

Jumping into river.—If a person, being attacked, should, from an apprehension of immediate violence—an apprehension which must be well grounded and justified by the circumstances—throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder (*g*).

False charge of capital crime.—Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder (*h*).

But a person cannot be indicted for murder in procuring another to be executed by falsely charging him with a crime of which he was innocent (*i*).

A year and a day.—A person is not deemed to have committed homicide, although his conduct may have caused death, when the death takes place more than a year and a day after the injury causing it.[4]

Homicide—"Constructive Murder."

[27.] **R. *v.* SERNÉ and GOLDFINCH.**

[16 Cox, C. C. 311 (1887).]

The prisoners, Leon Serné and John Henry Goldfinch, were

(*d*) 2 Moo. & Rob. 351.
(*e*) R. *v.* Murton, 3 F. & F. 492.
(*f*) R. *v.* Towers, 12 Cox, C. C. 530.
(*g*) R. *v.* Pitts, C. & M. 284.
(*h*) R. *v.* Evans, 1 Russ. C. & M. 676.
(*i*) R. *v.* MacDaniel, 1 Leach, 44.

[3] If one's death is accelerated by ill treatment of another, he is liable: State *v.* Baker, 1 Jones, 267; State *v.* Murphy, 33 Iowa, 270.

[4] If within one year and a day he dies from a disorder produced by a wound, the party who inflicted it is guilty: Kee *v.* State, 28 Ark. 155; State *v.* Bently, 44 Conn. 537.

indicted for the murder of a boy, Sjaah Serné, the son of the prisoner Leon Serné, it being alleged that they feloniously set on fire a house and shop, No. 274, Strand, London, by which act the death of the boy had been caused. It was suggested for the prosecution that, even if the prisoners did not deliberately intend to kill the boy, they were guilty of "constructive murder" if it could be * shown that they were attempting [*41] the felony of burning down the house to get the insurance money on it, and that the deceased accidentally perished in the flames. This view of the law, however, did not commend itself to the Court, and there was an acquittal.[1]

"To take another very old illustration," said Stephen, J., "it was said that, if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony. I very much doubt, however, whether that is really the law, or, whether the Court for the consideration of Crown Cases Reserved would hold it to be so. . . . I think that, instead of saying that any act done with intent to commit a felony, and which causes death, amounts to murder, it would be reasonable to say that *any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony*, which caused death, should be murder. As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder."

[Geogham, Forrest Fulton, Lawless, Hutton, and Bodkin for prisoners; Poland and C. Matthews for Crown.]

"*Constructive murder.*" *R. v. Nash.*—It is considered that this case is fairly entitled to rank as a leading case, as the judicial heel is here, for the first time, put firmly down on the old and absurd doctrine of "constructive murder." Even so recently as in August of 1881, that doctrine was defended from the bench. In reply to Mr. Ribton, counsel for the defence in R. *v.* Nash (*k*), who "contended that the doctrine of constructive murder was only founded on dicta long acted upon, but not really coming within the

(*k*) Centr. Crim. Ct. Sessions Papers, vol. 94, p. 391.

[1] Murder in the first degree may exist, though no intent to kill existed at the time in the perpetration of arson or robbery or rape: Comm. *v.* Pemberton, 118 Mass. 36; Moynihan *v.* State, 70 Ind. 126; Comm. *v.* York, 9 Metc. 93.

As to the right of the Supreme Court of the United States to review the judgment of the Federal Courts in criminal cases see the note In the matter of August Spies, *et al.*, 27 Amer. Law. Reg. (N. S.) 40.

meaning of the words *malice aforethought*," Mr. Justice Grove "was clearly of opinion that the case must go to the jury as one of murder, the argument submitted by Mr. Ribton being *entirely contrary to the ruling always laid down by the judges*" (*k*).

[*42] * *Burning a tramp.*—In R. *v.* Horsey (*l*) (a case tried at the Kent Summer Assizes in 1862), a man set fire to a stack, and a person sleeping by it was burned to death. Baron Bramwell, in summing up, adopted the rule laid down by Foster, but suggested to the jury that, if the deceased was not shown to be in the barn at the time when the prisoner set fire to the stack, they might acquit him, on the ground that the man's death was not the natural and probable consequence of his act. "As it is laid down as law," said the learned Baron, of the doctrine of constructive murder, "it is our duty to act upon it." As a matter of fact, however, he did not act upon it, but evaded it.

Homicide by Correction.

[28.] **R. *v.* HOPLEY.**

[2 F. & F. 202 (1860).]

The prisoner was a schoolmaster at Eastbourne, and a rather stupid boy of thirteen or fourteen, named Cancellor, was entrusted to his charge. At the beginning of the summer term in 1859 the prisoner wrote to the parent, saying the boy was extremely obstinate, and ought to be severely and frequently beaten. "I do not wish to interfere with your plan," replied the father. Accordingly, the schoolmaster beat the boy *for two hours and a half secretly in the night with a thick stick* until he died. It was held that, such punishment being excessive and unreasonable, the schoolmaster was guilty of manslaughter.

[Ballantine, Serjt., and G. Denman for prisoner; Parry, Serjt., and Knapp for Crown.]

Correction must be moderate. Great staff.—Even if it be admitted that sparing the rod means spoiling the child, the corporal punishment administered by a father to a son, or a master to his scholar, must be moderate and reasonable. If it is not, and death results, it will be murder or manslaughter according to the circumstances. "In a case at Norwich Assizes in 1670," says Sir Matthew Hale (*m*), "where the master struck a child that was his

(*k*) See Fost. 258.
(*l*) 3 F. & F. 287.
(*m*) Hale, Pleas of Crown, 1, 473.

apprentice with a great staff, of which it died, it was ruled murder." Perhaps, considering the size of the stick which Hopley *used, and [*43] the cruel vigour with which the he wielded it, he had reason to congratulate himself on being convicted only of manslaughter.[1]

Strapping an Infant—In R. *v.* Griffin (*n*) it was held that a father who for some childlish fault gave an infant of two and a-half years about a dozen strokes with a strap an inch wide and eighteen inches long, from the effects of which the child died, was guilty of manslaughter. "The law as to correction," said Martin, B., "has reference only to a child capable of appreciating correction, and not to an infant two years and a-half old. Although a slight strap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable." [2]

Homicide—Provocation.

R. *v.* FISHER, [29.]

[8 C. & P. 182 (1837).]

If a father actually sees a man in the act of committing an unnatural crime with his son, a boy of fifteen, and immediately kills him, his doing so is not murder, but manslaughter; but, if he only hears about it, and then pursues the blackguard and kills him after an interval, he is guilty of murder, notwithstanding that his indignation may not have in the least degree subsided.[3]

"In all cases," said Park J., "the party must see the act done. What a state should we be in if a man, on hearing that something had been done to his child, should be at liberty to take the law into his own hands, and inflict vengeance on the offender! In this case the father only heard of what had been

(*n*) 11 Cox, C. C. 402.

[1] The brutal treatment of a servant resulting in death on the part of the master is homicide: State *v.* Hoover, 4 Devx. & Bat. 365; Souther *v.* Comm., 7 Gratt. 673.

[2] Where the right to chastise is abused, that a mother so brutally beats her child with an instrument calculated to kill that it dies, it is murder: Tempe *v.* State, 40 Ala. 350.

[3] Where a homicide has been committed, after sufficient time has elapsed between the quarrel and the going out to fight to allow the blood to cool, it is murder: Watson *v.* State, 63 Ind. 548; People *v.* Smith, 26 Cal. 665.

done from others. I say, therefore, and I do it with the assent of those who are with me, that there is not enough to reduce the offence from murder to manslaughter."

[C. Phillips for prisoner; Bodkin for Crown.]

Caught in the act.—So, if a man catches another in the act of adul- [*44] try with his wife, * and kills him, or her, in the first transport of passion, he is only guilty of manslaughter, for the law recognizes the immensity of the provocation; but the killing of an adulterer deliberately and for revenge would be murder (*o*).[2]

Provocation must be substantial—To reduce murder to manslaughter, the provocation must be such as would upset not merely a hasty and hot tempered person, but one of ordinary sense and calmness; and, in any case, twenty minutes or half an hour would be considered ample time for passion to subside, and reason to resume its sway.

Words no provocation. Words and spitting.—Mere words, however irritating or insulting, cannot constitute the kind of provocation required by the law; and the case of R. *v.* Rothwell (*p*) where Blackburn, J., held on the Northern Circuit, that special circumstances may take a case out of the general rule, must be regarded as a decision of very doubtful authority. But an assault too slight in itself to be sufficient provocation to reduce murder to manslaughter, may become sufficient when coupled with words of great insult. This was held in a case in which a wife not only used the most frightful language to her husband, but also spat at him (*q*). Neither the language nor the spitting would have been enough provocation by itself, but together they affected the reduction (*r*). "If two military officers," said Byles, J., "met in the street, and one called the other a coward and a scoundrel, and spat in his face, and if the one so treated immediately drew his sword and stabbed the person assaulting him, this, I think, would be manslaughter." [3]

Express malice.—Provocation is no defence where there has been express malice, or where it was sought by the prisoner himself. "If a person has received a blow," said Coleridge, J., in R. *v.* Kirkham (*s*), where the prisoner was indicted for the murder of his son, "and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for

(*o*) R. *v.* Maddy, 1 Ventr. 158.

(*p*) 12 Cox, C. C. 145.

(*q*) It did not appear whether the lady actually spat *on* him, but spitting *at* a person is an assault though not a battery.

(*r*) R. *v.* William Smith, 4 F. & F. 1066.

(*s*) 8 C. & P. 117.

[2] When the husband discovers the wife in the act of adultery and kills the intruder in a passion, the law mitigates his offence: Comm. *v.* Whitler 2 Brews. 388, Maher *v.* People, 10 Mich. 212; State *v.* John, 8 Ired. 330; State *v.* Samuel, 3 Jones (N. C.), 74.

[3] The passion may be heated to a high degree of exasperation by the conduct and acts of the deceased and this may be produced by words: Comm. *v.* Biron, 4 Dall. 125; State *v.* Abarr, 39 Iowa, 185; Wilson *v.* Comm., 3 Bush. 105; Atkins *v.* State, 16 Ark. 569.

what he does ; and therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have been given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, *all the blows will go for nothing.* [1]

Provocation sought. Friends and comrades.—"Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is, in some cases, provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence.

But it is uncertain how far this principal extends." (*t*).

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* *Homicide—Negligence.* [* 45]

R. *v.* SALMON AND OTHERS. [30.]

[6 Q. B. D. 79 (1880).]

Three young fellows took a rifle, which would have been deadly at a mile, and began practising firing with it at a target, which they erected in a field near to roads and houses, from a distance of about 100 yards. One of the shots thus fired (it was not proved by which particular young fellow) killed a boy in a tree in a neighbouring garden, at a spot 393 yards from the firing point. It was held that all three were guilty of manslaughter.

"It is the legal duty," said Stephen, J., "of everyone who does any act which, without ordinary precautions, is or may be dangerous to human life, to employ those precautions in doing it. Firing a rifle under circumstances such as in the present case, was a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger." [2]

[Norris for Crown.]

Dangerous acts.—Where an act, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it ex-

(*t*) Steph. Dig. Cr. Law, p. 151.

[1] Killing on account of an old grudge, on provocation sought by the slayer, will not be excused: Adams *v.* People, 47 Ill. 208; but where a fresh provocation arises, it may be reduced to manslaughter : Copeland *v.* State, 7 Humph. 419 ; Williams *v.* State, 3 Heisk. 376 ; State *v.* Barnwell, 80 N. C. 466.

[2] As to accidentally killing in the unlawful and negligent use of fire-arms without mischievous intent: Whart. on Hom. Sec. 88.

cusable, that the party, whilst doing the act, used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least.[2]

Football.—If a person whilst doing or attempting an unlawful act (*malum in se*), but not amounting to felony, undesignedly kill a man, he is guilty of manslaughter. For instance, in the well-known football case, R. *v.* Bradshaw (*t*), it was laid down that if, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, it is manslaughter; nor is it material to consider whether the act which caused the death was in accordance or not with the rules and practice of the game. "No rules or practice of any game whatever," said Bramwell, L. J., "can make that lawful which is unlawful by the law of the land; and the [*46] law of the land says you shall not do that which is likely *to cause the death of another.[3] *'Arry at the sea-side.*—So if a man throws a stone at a horse, and it hits the rider and kills him, it is manslaughter (*u*). But a mere civil wrong, committed by one person against another, cannot be made the foundation of the crime of manslaughter. So where, one summer day in 1882, a stupid fool, who was disporting himself on the West Pier at Brighton, snatched up a big box from the refreshment-stall, and pitched it recklessly into the sea, thereby unintentially killing a boy who happened just then to be bathing, it was held that the civil wrong against the refreshment stall-keeper was immaterial to the charge of manslaughter. If he was to be convicted it must be *upon the broad ground of negligence and not upon the narrow ground of his having committed a trespass.* "I have a great abhorrence," said Field, J.. "of constructive crime."

See some remarks of Stephen, J., on manslaughter by negligence, in the very recent case of R. *v.* Doherty, 16 Cox, C. C. 306.

Homicide—Neglect of Duty.

[31.] **R. *v.* MORBY.**

[8 Q. B. D. 571 (1882).]

Mr. Morby, of Woolwich, was one of the "Peculiar People," and, when one of his friends fell ill, he did not believe in doctors for effecting a cure, but only in prayers and anointment. On the 27th of December, 1881, his little boy of eight years old was

(*t*) 14 Cox, C. C. 83.
(*u*) 1 Hale, 39.

[2] The accidental killing of a human being in the prosecution of an unlawful act and without due caution: State *v.* Zellars, 2 Halst. 220; Lee *v.* State, 1 Cold. 62; State *v.* Benham, 23 Iowa, 154.

[3] Killing with a chance blow of the fist or a kick is manslaughter: Wellar *v.* People, 30 Mich. 16.

known to be suffering from confluent small-pox, and yet no medical aid was called in. On January 8th he died—as the post-mortem examination showed—of the disease. Nothing could be clearer than that, if the doctor had been sent for at once, the child's life might have been saved, but, on the other hand, it might not have been; and, there being therefore no positive evidence that the death was caused or accelerated by the neglect to provide medical aid or attendance, it was held that the father could not be properly convicted of manslaughter.

"It is not enough," said Lord Coleridge, C. J., "to *show neglect of reasonable means for preserving or pro- [*47] longing the child's life; but to convict of manslaughter it must be shown that the neglect had the effect of shortening life. . . . . In order to sustain the conviction affirmative proof is required."

"Under section 37 of 31 & 32 Vict. c. 122," said Stephen, J., "it may be the prisoner could have been convicted of neglect of duty as a parent, but to convict of manslaughter you must show that he caused death or accelerated it."

[D. Kingsford for prisoner; Poland and Mead for Crown.]

R. v. *Downes.*—In the earlier cases of R. *v.* Downes (*x*), where the facts were somewhat similar, it was distinctly shown, and found by the jury, *that the child's death was caused by the neglect to provide medical aid*, and therefore the conviction for manslaughter was upheld. "I agree with my Lord Coleridge," said Bramwell, B., "as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty on parents, whatever their conscientious scruples may be. The prisoner wilfully—not maliciously, but intentionally—disobeyed the law, and death ensued in consequence. It is therefore, manslaughter." The material words, it may be mentioned, in section 37 of 31 & 32 Vict. c. 122, are as follows:—"When any parent shall wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been, or shall be likely to be, seriously injured, he shall be guilty of an offence punishable on summary conviction."

In R. *v.* Nicholls (*y*), an old woman was put upon her trial for the manslaughter of her grandson, an infant of tender years, who was said to have died from the neglect of the prisoner to supply him with proper nourishment. "If a grown-up person," said Brett, J.—*R. v. Nicholls*—"chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without, at all

(*x*) 1 Q. B. D. 25.
(*y*) 13 Cox, C. C. 75.

events *wicked* negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be wicked negligence."[1]

[* 48] **Not fetching midwife.*—In another case (*z*), a girl of eighteen was taken in labour at her step-father's house during his absence. The mother omitted to procure for her the assistance of a midwife, in consequence of which the girl died. It was held that the mother was not legally bound to procure the aid of a midwife, and that she could not be convicted of manslaughter for not doing so (*a*).

Relieving officers.—The recent case of R. *v.* Curtis (*b*), should be referred to as to the responsibility of relieving officers for refusing medical assistance to destitute persons in cases of urgent necessity.

Attempt to Murder.

[32.] **R. *v.* SAMUEL BROWN.**

[10 Q. B. D. 381 (1883).]

Brown drew a loaded revolver from his pocket for the purpose of murdering his friend, Sutton. Sutton's nephew saw what he was up to, and snatched the weapon away before he had time to do anything more. It was held that the offence was not within sect. 15 of 24 & 25 Vict. c. 100, under which the prisoner had been tried and convicted.[2]

[Poland for Crown.]

24 & 25 Vict. c. 100, s. 14, punishes several ways of attempting to commit murder, one of which is, "Whosoever shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any per-

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(*z*) R. *v.* Shepherd, L. & C. 147.

(*a*) The case appears to have turned to some extent on the fact that there was no evidence that the mother had money enough to pay for a midwife.

(*b*) 15 Cox, C. C. 746.

[1] It is the duty of parents to provide food and shelter for their children, and the neglect to do so, if death results therefrom, is manslaughter: State *v.* Preslar, 3 Jones (N. C.), 421.

[2] The intent to do a wrongful act, coupled with overt acts towards its commission, constitutes an attempt: People *v.* Lawton, 56 Barb. 126. Attempts to commit homicide are indictable, though they may be frustrated: Cox. *v.* People, 82 Ill. 191; Smith *v.* Comm., 54 Pa. 209; Comm. *v.* Willard, 22 Pick. 476. Solicitations are indictable, if they involve the employment of means to effect illegal ends: Penna. *v.* McGill, Addis. 21; Collins *v.* State, 3 Heisk. 14.

son with intent to commit murder." Sect. 15 punishes every one who "by any means other than those specified in any of the preceding sections of this Act attemps to commit murder." The probabilities are that, notwithstanding two decisions in the 9th volume of Carrington and Payne (*c*), Brown's offence would now be held to come within sect. 14.

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* *Conspiracy to Murder.* [* 49]

R. *v.* MOST. [33.]

[7 Q. B. D. 244 (1881).]

Shortly after the assassination of the Emperor of Russia the prisoner published a violent article in a German newspaper called *Freiheit*, published and circulating in London, exulting in the murder, and recommending all true patriots to follow the example set. It was held that he could be convicted, under 24 & 25 Vict. c. 100, s. 4, of "endeavouring to persuade" to murder.

"An endeavour to persuade, or an encouragement," said Lord Coleridge, C. J., "is none the less an endeavour to persuade, or an encouragement, because the person who so encourages, or endeavours to persuade, does not, in the particular act of encouragement or persuasion, personally address the number of people, the one or more persons, whom the address which contains the encouragement or the endeavour to persuade reaches."

[A. M. Sullivan for prisoner; Sir H. James, A.-G., Sir F. Hershell, S.-G., Poland, and A. L. Smith for Crown.]

Conspiring to murder. Soliciting to murder.—The 4th section of 24 & 25 Vict. c. 100, provides that all persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of her majesty or not, and whether he be within the Queen's dominions or not, shall

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(*c*) R. *v.* St. George, 9 C. & P. 483, and R. *v.* Lewis, 9 C. & P. 523, both which cases are threatened in the judgments of the leading case with re-consideration.

be guilty of a misdemeanour,"[1] punishable with not more than ten and not less than five years penal servitude, or with imprisonment, with or without hard labour, for any term not exceeding two years.

Threatening letter.—Although conspiracy to murder is only a misdemeanour, sending a letter threatening murder is a felony (*d*).

[* 50] * *Agreement to commit suicide.*—If two persons enter into an agreement to commit suicide together, and the means employed to produce death prove fatal to one only, the survivor is guilty of murder (*e*).[2] In the latest case in which this was held (*e*). It was ingeniously contended by the prisoner's counsel that a distinct consideration must be proved for the survivor's promise to destroy himself, but the Court said that that was "not the law of the land."

Grievous Bodily Harm.

[34.] **R. *v.* EDWIN MARTIN.**

[8 Q. B. D. 54 (1881).]

Just before the conclusion of the performance at the Leeds Theatre Royal on the 30th of April, 1881, a mischievous rough determined to play a practical joke on the audience. Accordingly, he put out the gaslights on a staircase which a large number of the people had to descend, and blocked up the exit with an iron bar. The result was that a large portion of the audience were seized with panic, and rushed wildly down the staircase against the iron bar. Amongst those seriously injured were two men named Pybus and Dacey. It was held that the rough could be convicted of unlawfully and maliciously inflicting grievous bodily harm upon them.

"The prisoner," said Lord Coleridge, C. J., "must be taken to

(*d*) 24 & 25 Vict. c. 100, s. 16. See page 66.

(*e*) R. *v.* Jessop, 16 Cox, C. C. 204.

[1] While conspiracies to commit murder under 24 & 25 Vict. c. 100, etc., is a misdemeanour, yet under the rigor of the American criminal law such conspiracies are indictable as felonies: Comm. *v.* Crowninshield, 10 Pick. 497; State *v.* George, 7 Ired. (N. C.) 321; Rufer *v.* State, 25 Ohio, 465; Archer *v.* State, 106 Ind. 426; 6 Parker's Crim. Rep. (N. Y.) 336; Lamb *v.* People, 96 Ill. 73.

[2] At common law an attempt to commit suicide was a misdemeanour though otherwise under statute: Comm. *v.* Dennis, 105 Mass. 162. A person may be a principal in aiding or abetting a suicide at common law: Comm. *v.* Bowen, 13 Mass. 356; Blackburn *v.* State, 23 Ohio, 165.

have intended the natural consequences of that which he did. He acted 'unlawfully and maliciously,' not that he had any personal malice against the particular individuals injured, but in the sense of doing an unlawful act calculated to injure, and by which others were in fact *injured; just as in [* 51] the case of a man who unlawfully fires a gun among a crowd, it is murder if one of the crowd is thereby killed."

"If the prisoner," said Stephen, J., "did that which he did 'as a mere piece of foolish mischief' unlawfully and without excuse, he did it *'wilfully,' that is, 'maliciously,'* [1] within the meaning of the statute."

[No counsel appeared.]

"Maliciously." *R.* v. *Ward.*—24 & 25 Vict. c. 100, s. 20, provides that, "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour;" and according to the construction which, as we see in the leading case, is to be placed on the word "maliciously," a man acts *maliciously* when he *wilfully* does that which he must know will injure another. "All that is meant by the presumption of malice is that, when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act" (*f*). See R. *v.* Ward (*g*), where the prisoner shot at the prosecutor rather with the intention of frightening than of hurting him, and yet was held guilty of unlawful wounding under 14 & 15 Vict. c. 19, s. 5.

Wounding.

R. *v.* LATIMER. [35.]

[17 Q. B. D. 359 (1886).]

The prisoner, a soldier, was drinking and quarrelling in a public house at Devonport. He took off his belt and aimed a blow at a man named Chaffle. The belt, however, bounded off Chaffle and inflicted severe injuries on the landlady, who was standing talking to him. It was held * that though, ac- [* 52]

(*f*) Roscoe's Criminal Evidence, 10th ed. p. 23.
(*g*) L. R. 1 C. C. R. 356.
[1] Malicious mischief is any malicious physical injury either to the rights of another or to those of the public in general: 2 Whart. on Crim. Law, Sec. 1067.

cording to the finding of the jury, the striking of the landlady was "purely accidental, and not such a consequence of the blow as the prisoner ought to have expected," he was nevertheless properly convicted of unlawfully and maliciously wounding her.[1]

[H. H. S. Croft for prisoner; Melsheimer for Crown.]

R. v. *Pembliton.*—The prisoner's counsel in this case relied principally on the authority of R. *v.* Pembliton (*h*), decided in 1874. In that case the prisoner, in the course of a row in a Wolverhampton street, hurled a stone at a foe, but, making a bad shot, broke a valuable plate-glass window. He was indicted under section 51 of 24 & 25 Vict. c. 97, with "unlawfully and maliciously" committing damage, injury, and spoil on property to an amount exceeding 5*l.*, but got off because the jury expressly found that the good fellow *never intended to break the window*, his only desire being to damage the people he had been quarrelling with. "Taking this finding," said Lush, J., "I cannot say that there was an intent, either actual or constructive, and 'malicious' certainly must be taken to imply an intention, either actual or constructive." In the leading case, R. *v.* Pembliton (*h*) was distinguished, because there "*there was no intention to injure any property at all. It was not a case of attempting to injure one man's property and injuring another's, which would have been wholly different*" (*i*); and R. *v.* Hunt (*k*), where, in a cutting case, it was held that general malice was sufficient under the statute without particular malice against the person cut, was followed.

R. v. *Stopford.*—In R. *v.* Stopford (*l*), it was held that a man might be found guilty of wounding his friend Jones, with intent to do him grievous bodily harm, although it was proved that he had mistaken him for his enemy, Brown.

R. v. *Fretwell.*—In R. *v.* Fretwell (*m*), the prisoner was a young fellow who had been assaulted and annoyed by several other young men, among whom was the prosecutor. Soon afterward, while these young men were standing together in a group of about fifteen persons, the prisoner drew a pistol from his pocket and fired wildly among the lot, not aiming at any one in particular, but intending to injure somebody. The prosecutor received some severe shot wounds in his neck and chin, and it was held that the prisoner could be properly convicted of shooting at him with intent to do him grievous bodily harm.[2]

(*h*) L. R. 2 C. C. R. 119.
(*i*) Per Lord Esher, M. R.
(*k*) 1 Moo. C. C. 93.
(*l*) 11 Cox. C. C. 643.
(*m*) L. & C. 443.

[1] If death ensues from the performance of a lawful act, it will be murder, manslaughter, or misadventure, according to the circumstances: Comm. *v.* York, 9 Metc. 93; State *v.* Smith, 32 Me. 369. Recklessly throwing a billet of wood and thereby causing death is manslaughter: Moore *v.* State, 18 Ala. 532.

[2] Recklessly firing a gun is manslaughter, or pursuing another with a pistol in sport and death ensues is manslaughter: Collier *v.* State, 39 Ga. 31.

* *Administering "Noxious Things."* [* 53]

R. *v.* HENNAH. [36.]

[13 Cox, C. C. 547 (1877).]

The prisoner was charged, under 24 & 25 Vict. c. 100, s. 24, with unlawfully and maliciously administering to a woman named Rowe "a poison," to wit, "a certain destructive or noxious thing," called *cantharides*, with intent to injure, aggrieve, or annoy. It was proved by the medical authorities that cantharides (otherwise called Spanish fly), when administered in small quantities, is incapable of producing any effect, although twenty-four grains would kill a man. The prisoner had only given the prosecutrix one or two grains, and such a small quantity could not possibly have done her any harm. On these facts the prisoner was held entitled to his acquittal.[1]

"What is important to the present case," said Cockburn, C. J., "is that the quantity administered was incapable of producing any effect. The statute makes it an offence to administer, although not with the intention of taking life or of doing any serious bodily harm, any noxious thing with intent to cause injury or annoyance. But *unless the thing is a noxious thing in the quantity administered, it seems exceedingly difficult to say logically there has been a noxious thing administered.* The thing is not noxious in the form in which it has been taken; it is not noxious in the degree or quantity in which it has been given and taken. We think, therefore, the indictment will not hold."

[Carter for prisoner; St. Aubyn for Crown.]

R. v. *Cramp.*—The leading case appears to have this qualification engrafted on it by the latter decision of R. *v.* Cramp (*n*) (where half an ounce of *oil of juniper had been administered to a woman in the [* 54] hope of procuring her miscarriage), that if the thing given were a recognized "poison," it would come within the Act, even if administered in so small a dose as to be innocuous.[2]

(*n*) 5 Q. B. D. 307.

[1] A physician having a knowledge of the fatal tendency of his prescription, when death ensues, is guilty of manslaughter: Rice *v.* State, 8 Mo. 561.

[2] The procuring of a miscarriage is malicious, if done from any wicked or base motive, and the consent of the woman furnishes no justification: Comm. *v.* Wood, 11 Gray, 85.

Administering drugs to a pregnant woman, or employing any means to procure a miscarriage, unless necessary to preserve life, is a criminal offence: Bassett *v.* State, 41 Ind. 303.

Tramp for Chemist—Police Ingenuity.

[37.] **R. *v.* TITLEY.**

[14 Cox, C. C. 502 (1880).]

This was a case in which the police laid a trap for a chemist whose business, as he put it himself, "generally lay with ladies whose husbands were away." It was held that supplying a noxious thing to a person with the intent that it shall be used by a certain woman to procure abortion, is a misdemeanour within 24 & 25 Vict. c. 100, s. 59, *although the woman for whom it is intended is not pregnant.*[1]

[Edward Clarke, Q. C., and Besley for prisoner; Poland and Montague Williams for Crown.]

R. v. *Hillman.*—The Court (Mr. Justice Stephen) in this case followed R. *v.* Hillman (*n*), where the prisoner had supplied a noxious drug, but the woman had no intention of taking it. The conviction was affirmed because, as Erle, C. J., said, "The defendant knew what his own intention was."

Rape—Consent and Submission.

[38.] **R. *v.* FLATTERY.**

[2 Q. B. D. 410 (1877).]

A man who kept a stall in a public market, and professed [* 55] to give medical and surgical advice, fraudulently * had sexual connection with a girl of nineteen, under the pretence that he was going to perform an operation which would cure her of an illness. It was only "Nature's string," he remarked that "wanted breaking." It was held that there was no consent to the intercourse, and that the prisoner was guilty of rape.[2]

(*n*) 9 Cox, C. C. 386.

[1] The fact that a substance which would not produce a miscarriage was used with criminal intent, is no defence: State *v.* Owens, 22 Minn. 238.

In Colorado and Michigan, if the substance administered is unwholesome and may occasion injury to a pregnant woman, it is noxious under the Statute: Dougherty *v.* People, 1 Col. 517; People *v.* Carmichael, 5 Mich. 21.

[2] In an indictment for rape, acquiescence obtained on pretext of medical treatment, is no defence: Don Moran *v.* People, 25 Mich. 356; but it must be a clear case of ignorance and simplicity on the part of the female: Walter *v.* People, 50 Barb. 144.

"*She submitted,*" said Kelly, C. B., "*to a surgical operation and nothing else.* It is said, however, that, having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument."

[Lockwood for prisoner; Sir H. Giffard, S.-G., and C. Bowen for Crown.]

Personating husband. Violating idiots.—It was formerly held that the having carnal knowledge of a woman by a fraud, which induced her to suppose it was her husband, was not rape (*o*).[2] It has been enacted, however, by the Criminal Law Amendment Act, 1885 (*p*), that such a personation, successfully carried out, shall make the offender guilty of that crime. The same statute makes it a misdemeanour, punishable with two years imprisonment, to unlawfully and carnally know, or attempt to know, any female idiot or imbecile under circumstances which do not amount to rape, but which prove that the offender knew the woman was an idiot or imbecile (*q*).[3]

Submission.—It is to be observed that in cases of this kind there is a distinction known to the law between consent and submission. "Mere submission," as Kelly, C. B., said in R. *v.* Wollaston (*r*), "is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done." It is obvious, however, that Courts and juries must be careful not to avail themselves of this distinction for the mere purpose of securing the punishment of an immoral man, because the law expects that a person who is indecently assaulted shall make an immediate and effective resistence, and his or her not doing so raises a presumption of participation amounting to consent. In the case last referred to, for instance, where the prosecutors were two boys of fourteen, * the Chief Baron, [* 56] after stating the distinction between consent and submission, went on to say, "But in the present case there was actual participation by both parties in the act done, and complete mutuality. We should be overturning all the principles of law to say that in this case there was any assault in law" (*s*). R. *v.* Lock (*t*) shows that almost, if not quite, the only case of

(*o*) R. *v.* Barrow, L. R. 1 C. C. R. 156.
(*p*) 48 & 49 Vict. c. 69, s. 4.
(*q*) Sect. 5, sub-s. (2). (*r*) 14 Cox, C. C. 180.
(*s*) If such a case happened now, the proper course would be to indict them all three under the 11th section of the Criminal Law Amendment Act, 1885.
(*t*) L. R. 2 C. C. R. 10.

[2] Force is an ingredient of rape and "constructive force" arises where the act was consummated with one who thought she lay with her husband: State *v.* Shephard, 7 Conn. 54.
Whatever the English doctrine, the American cases seem to favour the idea of "constructive force": Wyatt *v.* State, 2 Swan. 394; Lewis *v.* State, 30 Ala. 54; State *v.* Brooks, 76 N. C. 1.

[3] Unconscious submission through mental disease is not consent in a defence for rape: Stephen *v.* State 11 Ga. 225; State *v.* Tarr, 28 Iowa, 397.

submission not amounting to consent is where the assault is committed on "one who does not know the nature of the act done."

Stripping female patient naked.—In the well known case of R. *v.* Rosinski (*u*), a quack docter who made a female patient strip naked, under the pretence that he could not otherwise judge of her illness, was held to have committed an assault on her. The jury in this case expressly found that the prisoner had no real belief that the stripping the girl could assist him in enabling him to cure her, and accepted her statement that "she did not put off her clothes willingly, but that he made her," so that there was no difficulty.[1]

Character of Prosecutrix in Rape Case.

[39.] **R. *v.* RILEY.**

[18 Q. B. D. 481 (1887).]

The prosecutrix, in an attempted rape case, was asked in cross-examination *whether she had not repeatedly had voluntary connection with the prisoner before.*[2] This she denied, and it was proposed on behalf of the prisoner to call witnesses to prove times and places. The court refused to hear these witnesses, and the prisoner was found guilty. The Court for Crown Cases Reserved, however, held that the evidence ought to have been received, and quashed the conviction.

[Addison, Q. C. for prisoner.]

Connection with other men.—The prisoner, however, cannot call witnesses to show that the prosecutrix has had connection with *other* men named.[3] He may ask her in cross-examination whether such is not the fact, but he

(*u*) 1 Moo. C. C. 19.

[1] Consent induced by the influence of one in whose power the party outraged feels herself, is not a defence: Wright *v.* State, 4 Humph. 194; Pleasant *v.* State, 13 Ark. 360.

[2] Where a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, and she may be examined as to her previous connection with the prisoner: 111 Green. Evid. Sec. 214; Conkey *v.* People, 1 Abb. Dec. 418; Woods *v.* People, 55 N. Y. 515; State *v.* Forshuer, 43 N. H. 89.

[3] As to whether particular acts of connection with other men may be proved, the cases disagree: State *v.* Reed, 39 Vt. 417; Benstine *v.* State, 2 Lea, 169; People *v.* Benson, 6 Cal. 221; Strang *v.* People, 24 Mich. 1, *contra*; Comm. *v.* Hains, 131 Mass. 336; Richie *v.* State, 57 Ind. 355; McCombs *v.* State, 8 Ohio, 643.

is bound by her answer on the point. If the rule of evidence were * otherwise, "it would," as Kelly, C. B., said in R. *v.* Holmes (*x*) [* 57] "not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice."

Common prostitute.—It appears, however, that evidence to show that the prosecutrix is a common prostitute is still admissible (*y*).

Indecent Assault by Communicating Disease.

R. *v.* **BENNETT.** [40.]

[4 F. & F. 1105 (1866).]

The prisoner, knowing that he had a venereal disease, induced a young girl, who was ignorant of his condition, to consent to sleep with him, with the result that he communicated his disease to her. It was held that he was guilty of an indecent assault.

"Although," said Willes, J., "the girl may have consented to sleep, and therefore to have connection, with her uncle, yet, if she *did not consent to the aggravated circumstances, i. e.*, to connection with a diseased man, and a fraud was committed on her, the prisoner's act would be an assault by reason of such fraud. An assault is within the rule, that *fraud vitiates consent.*" [1]

[Murch for Crown.]

Actual bodily harm.—The prisoner might also, under a similar state of facts, be indicted for inflicting actual bodily harm (*z*).

No civil action.—But a civil action cannot be brought, under such circumstances, by the injured party, because *ex turpi causâ non oritur actio* (*a*). "Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts than to aid or enforce those acts or contracts themselves" (*b*).

(*x*) L. R. 1 C. C. R. 334.
(*y*) R. *v.* Clarke, 2 Stark. N. P. 241.
(*z*) R. *v.* Sinclair, 13 Cox, C. C. 28.
(*a*) Hegarty *v.* Shine, 14 Cox, C. C. 145.
(*b*) Per Ball, C., in Hegarty *v.* Shine.
[1] Richie *v.* State, 58 Ind. 355.

[* 58] * *Value of Property Stolen.*

[41.] **R. *v.* EDWARDS.**

[13 Cox, C. C. 384 (1877).]

Three pigs belonging to Sir William Hart-Dyke were bitten by a mad dog. Sir William thereupon had them shot, and buried three feet deep on his estate. The prisoners went the same evening, dug them up, and sent them to the London Meat Market, making about 10*l.* by the transaction. It was held that, notwithstanding that the owner had no intention of making any further use of the pigs, there was *no abandonment* of the property, and that the prisoners could be convicted of larceny.

[No counsel appeared.]

Value.—To constitute larceny, the thing stolen must be *of some value*, although it need not be of the value of any coin known to the law (*z*). Neither is it necessary that the property should be of value to third persons, if valuable to the owner (*a*).[1]

Stealing corpses.—Larceny at common law, however, cannot be committed of things which are not the subject of property, as of a corpse; but it is a misdemeanour to remove a dead body without authority (*b*), however laudable may have been the motives of the defendant (*c*).

Treasure trove. Wreck.—Of things in which no person has any determinate property, as treasure trove, waifs, &c., till seized, it has been said that larceny cannot be committed; but it would seem that the true owner, though unknown, has still a property in them, before seizure by the lord, unless there be circumstances to show an intended dereliction of the property (*d*). The same has been said of wreck, but wrecking is now punishable as a felony by 24 & 25 Vict. c. 96, s. 64.

Water.—Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny (*e*).

(*z*) R. *v.* Morris, 9 C. & P. 349.
(*a*) R. *v.* Clarke, 2 Leach, 1037.
(*b*) R. *v.* Lynn, 2 T. R. 733.
(*c*) R. *v.* Sharpe, Dears. & B. 160.
(*d*) 2 East, P. C. 606.
(*e*) Ferens *v.* O'Brien, 15 Cox, C. C. 332.

[1] The taking of articles of dress, *animo furandi* from the body of a dead man driven ashore from a wreck, is felony: Wonson *v.* Sayward, 13 Pick. 402 (1832).

* *Stealing Wild Animals.* [*59)

R. *v.* PETCH. [42.]

[14 Cox, C. C. 116 (1878).]

The prisoner was indicted under 24 & 25 Vict. c. 96, s. 67, for larceny, as a servant to the Maharajah Dhuleep Sing, of sixty-one dead rabbits, the property of his master. The prisoner was employed by the Maharajah to trap rabbits on a part of his estate, and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty, he from time to time took rabbits which he had trapped to another part of the land, and put them in a bag hidden in a hole near a furze bush, with the intention of appropriating them to his own use. This was noticed by one of the under keepers, a man named Howlett, who went to the bag while the prisoner was away and found sixty-one dead rabbits concealed. He took twenty of them out of the bag, marked them by cutting a small slit under the throat of each, and then replaced them in the bag, covering it up in the hole as it was before. His reason for nicking them in this way was, of course, that he might know them again. The prisoner afterwards went to the hole and took away the bag and the rabbits. It was held that the act of the keeper in nicking the rabbits was not a reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them.[1]

[Kingsford and Malden for prisoner.]

Reduction into possession neccssary.—Rabbits, upon being killed by a wrongdoer, become the property of the owner of the soil (*f*); but they are not thereby reduced into possession so as to support an indictment for larceny against a person wrongfully removing and carrying them away (*g*).

* *Dead partridge.*—Where the indictment was for stealing a dead [*60] partridge, and it turned out that it was shot by one of a shooting party, but was only wounded, and was picked up by the prisoner in a dying state, and it was held that it was not the subject of larceny, as it was *feræ naturæ*, and alive, and not reduced into possession (*h*).

Dogs.—A dog stealer is not indictable the first time of stealing, but a second offence is an indictable misdemeanour (*gg*).[2]

(*f*) Blades *v.* Higgs, 11 H. of L. Ca. 621.
(*g*) R. *v.* Townley, L. R. 1 C. C. R. 315.
(*h*) R. *v.* Roe, 11 Cox, C. C. 554. (*gg*) See 24 & 25 Vict. c. 96, s. 18.

[1] At the common law, wild animals were not subjects of larceny: Wallis *v.* Mease, 3 Binn. 346, Norton *v.* Ladd, 5 N. H. 203; but they become so by being killed or confined: State *v.* House, 65 N. C. 315.

[2] Animals like dogs kept for pleasure are not subjects of larceny: Baker *v.*

Corpus delicti.

[43.] **R. *v.* DREDGE.**

[1 Cox, C. C. 235 (1845).]

The prisoner, a little boy, was indicted for stealing a doll and some other toys from a shop at Tunbridge. He had gone to the shop dressed in a smock frock, under which, when he was searched, were found concealed a doll, six toy houses, and other things of the same sort. The owner of the toy shop swore the doll had been his, as he found his private mark on it, but he might have sold it. As to the toy houses, he believed them to be his property too, because they were exactly like other toys of the same sort which he had in his shop. But he could not say definitely that he had missed any of the articles which the prisoner was charged with stealing. On these facts it was held that the prisoner was entitled to be acquitted.

"It seems to me," said Erle, J., "that you have failed to establish in this case the *corpus delicti*.[1] It is true the prosecutor swears that the doll was once his, but *he cannot state that it was taken from him;* and, for aught that appears to the contrary, the prisoner may have come by it in an honest manner."

[Swaine for Crown.]

Pockets crammed with pepper.—The leading case was distinguished [*61] in the case of R. *v.* Burton (*h*), * where the prisoner was charged with stealing a quantity of pepper. He had been met by a constable coming out of a warehouse where a large quantity of pepper was stored, some

(*h*) 1 Dears. & B. 282.

State, 20 Ohio, 400; Ward *v.* State, 48 Ala. 161; unless they are subject to taxation: People *v.* Maloney, 1 Parker Crim. Rep. 593. In some of the States this is controlled by statute: State *v.* Summer, 2 Ind. 377; State *v.* McDuffee, 34 N. H. 523. Virginia adheres to the old law, while in South Carolina it is not judicially settled: Davis *v.* Comm., 17 Gratt. 617; State *v.* Trapp, 14 Rich. 203.

[1] The proof of the charge in criminal cases, involves the proof of two distinct propositions; *first*, that the act itself was done; and, *secondly*, that it was done by the person charged and by none other; in other words, proof of the *corpus delicti* and of the identity of the prisoner. It is seldom that either of these can be proved by direct testimony, but may be established by circumstantial evidence, provided it be satisfactory. 1 Green. on Evid. Sec. 30.

The *corpus delicti* in murder or manslaughter has two components, viz: death as the result, and the criminal agency of another as the cause. There must be direct proof of one or the other. Where one is proven by direct, the other may be by circumstances: People *v.* Bennett, 49 N. Y. 138 (1872).

in bags, and some loose on the floor. His pockets being suspiciously bulky, the policeman said, "I think there is something wrong about you;" to which the prisoner replied, "I hope you will not be too hard on me," and immediately produced a quantity of pepper from his pockets and threw it on the ground. "If a man go into the London Docks sober," said Mr. Justice Maule, "without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."

None missed.—In R. *v.* Mockford (*j*), the prisoner was found with dead fowls in his possession, of which he could give no account, and was tracked to a fowl house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner, from the neck of which feathers had been removed. The fowl-house, which was closed overnight, was found open in the morning. The spot where the prisoner was found was 1200 yards from the fowl-house, *and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any.* It was held, notwithstanding the prosecutor's ignorance, that the prisoner could be convicted of larceny.

"*Asportation*" *in Larceny.*

R. *v.* **POYNTON.** [44.]

[L. & C. 247 (1862).]

The prisoner was a letter-carrier at Leicester who, with intent to steal it, transferred a letter from his pouch to his pocket.[1] It was held that such a transfer was a sufficient "*asportation*"

[Merewether for prisoner; Boden, Q.C., and Mellor for Crown.]

R. v. *Thompson.* *R.* v. *Walsh.* *R. v. Cherry.* *R. v. Wilkinson.*—There must not only be a taking, but also a *carrying away*, or *"asportation," [*62] to constitute larceny. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them is sufficient.[2] Thus, where a thief drew a book part of the way out of the pros-

(*j*) 11 Cox, C. C. 16.

[1] A letter carrier in the United States who secretes, embezzles, or destroys a letter, packet, bag, or mail, commits an offence under the first clause of section 12, of the Act of Congress of 1864, and if containing any article of value, under the last clause of that section: People *v.* Husband, 36 Mich. 306.

[2] The removal of money from where the owner put it, and dropping it on being discovered, is an asportation: Eckels *v.* State, 20 Ohio, 508.

In Texas, a fraudulent taking is sufficient without asportation: Prim *v.* State, 32 Tex. 157.

ecutor's pocket, but being detected, let it drop back again, it was held that there was a sufficient asportation (*k*). So there was where a man removed a cask of wine from the head to the tail of the waggon in which it was placed with the intention of stealing it (*l*). But where the thief merely set a package on end in the place where it lay, for the purpose of cutting it open and getting at the contents, it was held not to be enough (*m*). So where he was not able to carry off the goods on account of their being attached by a string to the counter (*n*), or to carry off a purse on account of some keys attached to the string of it getting entangled in the owner's pocket (*o*), there was held in these cases not to be an asportation, because there was no severance.

In cases, however, where there is no asportation, the prisoner may be indicted for an attempt to steal.

Stealing from Automatons.

[45.] **R. *v.* HANDS.**

[16 Cox, C. C. 188 (1887).]

"*Only pennies, not halfpennies.*"

"*To obtain an Egyptian Beauties Cigarette, place a penny in the box and push the knob as far as it will go.*"

Such were the inscriptions on an automatic cigarette box, outside the Assembly Rooms at Cheltenham, placed there by the proprietor of the rooms, a Mr. Shenton.

The automaton, however, was so inexperienced in the ways and wiles of the world that it used to yield up its
[* 63] * treasures at the bidding not only of pennies, but of worthless brass discs.

It was held that the prisoner, for taking advantage of the sweet creature's innocence, and getting his cigarettes in this easy and inexpensive manner, could be convicted of larceny.

"The means," said Lord Coleridge, C. J., "by which the cigarette was made to come out of the box were fraudulent, and

(*k*) R. *v.* Thompson, 1 Moo. C. C. 78.
(*l*) R. *v.* Walsh, 1 Moo. C. C. 14.
(*m*) R. *v.* Cherry, 2 East, P. C. 556.
(*n*) Anon., 2 East, P. C. 556.
(*o*) R. *v.* Wilkinson, 1 Hale, 508.

the cigarette so made to come out was appropriated. . . . There was undoubtedly a larceny committed." [1]

[No counsel appeared.]

This case is inserted because it was the first of its kind. But there was no difficulty about it, as none of the ingredients necessary to constitute the crime of larceny were wanting.

Larceny by Trick.

R. *v.* BUCKMASTER. [46.]

[20 Q. B. D. 182 (1887).]

The prisoner, a professional betting man, trading under the name of "Griffith the Safe Man," went to Ascot races in 1887, to try and turn an honest (or dishonest) penny in his vocation. Just before a race was to be run, the prosecutor went up to him with the inquiry: "What price 'Bird of Freedom?'" "Seven to one to win," was the reply. Accordingly the prisoner made a bet with the prosecutor, laying odds against "Bird of Freedom," and the money for which the prosecutor backed the horse was deposited with the prisoner. (The prosecutor admitted that he would have been satisfied if he did not receive back the same particular coins he had deposited.) To the joy of the prosecutor, the Bird flew past the winning-post first, but * his [* 64] joy was somewhat damped when he found that Mr Buckmaster had disappeared. Ultimately, however, the gentleman was discovered, but he then "knew nothing about it." It was held that the prisoner was rightly convicted of larceny.

"The prosecutor," said Lord Coleridge, C. J., "deposited the money with the prisoner *not intending to part with the property*, for he was to have his money back in a certain event, whereas the prisoner, when he received the money, never intended to give it

[1] An indictment for larceny may be maintained, however little the thing taken is worth, if it is some value, even though less than the smallest coin or denomination of money known in the law: People *v.* Wiley, 3 Hill. 194; see Payne *v.* People, 6 Johns. 103; People *v.* Loomis, 4 Denio, 380; Wilson *v.* State, 1 Port. 118.

back in any event. It is true that the prosecutor would have been satisfied if he had received back not the identical coins which he deposited, but other coins of equal value, but that does not show that he meant to part with his right to the money."

[Keith Frith for prisoner.]

"*Welshing.*" *Powell* v. *Hoyland*—This case sets at rest the doubt which had previously existed as to whether a "welsher" could be convicted of larceny. For the prisoner it was ingeniously, but unsuccessfully, contended by Mr. Keith Frith that, if he was guilty of any crime at all, it was obtaining money by false pretences, and the following dictum of Parke, B., in Powell *v.* Hoyland (*p*), was cited: "If a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." But, on the other hand, Oliver's case (*q*) and R. *v.* Robson (*r*) were held to be in favour of the conviction.[1]

R. v. *Oliver.* *R* v. *Robson.*—In the former of these two cases the prosecutor had handed to the prisoner 35*l.* in bank notes for the purpose of their being cashed, the prisoner, however, intending not to cash them for the prosecutor, but to steal them. "Wherever there is a felonious design," said the Court, "the property, notwithstanding the delivery, is still in the constructive possession of the true owner."[2] In the other case, the facts were somewhat similar to those of the leading case, and the conviction was held right, "because at the time of the taking the prosecutor parted only with the possession of the money."

Right of property parted with.—But *where the right of property as well as the possession is parted with by the delivery, there can be no larceny,* however fraudulent may be the means by which the delivery of the goods is procured (*s*)

(*p*) 6 Exch. 70.
(*q*) Cited in R. *v.* Walsh, 4 Taunt. 274.
(*r*) R. & R. 413.
(*s*) See R. *v.* Harvey, 1 Leach, 467; R. *v.* Adams, R. & R. 225, and R. *v.* Thomas, 9 C. & P. 741.

[1] Between false pretence and larceny, the authorities have established a distinction too firmly to be overthrown: if by fraud one is induced to part with goods, meaning to relinquish his property and possession in them, there being no trespass in the taking, they are obtained by false pretence: Smith *v.* People, 53 N. Y. 11; State *v.* Shoaf, 68 N. C. 375; but if one consents to part with merely the possession and the party taking the goods intends a theft without reference to fraud, a larceny is committed: Lewer *v.* Comm., 15 S. & R. 93; State *v.* Watson, 41 N. H. 533; State *v.* Humphrey, 32 Vt. 569; Welsh *v.* People, 17 Ill. 339.

[2] In a leading case in Illinois, a person was induced by three fellow passengers in a railroad car to make a wager with one of them and the stakes were deposited with another; upon discovering that the opposite party had only placed waste paper in the hands of the stake-holder, he demanded the amount of his wager which was refused. They were held to be guilty of larceny; Stinson *v.* People, 43 Ill. 397.

* *Extortion by Frightening.* [* 65]

R. *v.* McGRATH. [47.]

[L. R. 1 C. C. R. 205. (1869).]

Jane Powell, passing a sale room at Liverpool, was invited to enter, and did so. There were about a dozen persons in the room, and the prisoner was acting as auctioneer, and selling table cloths and other articles. Although he knew very well that she had not made any bid, the auctioneer knocked down a piece of cloth to Jane Powell for 26*s.*, and refused to let her leave the room till she had paid for it. Simply because she was afraid, she paid the money. The prisoner was afterwards convicted of feloniously stealing these twenty-six shillings, and it was held that the conviction was right: because, if the force used to the woman made the taking a robbery, larceny was included in that crime; whereas, if the force was not sufficient to constitute a robbery, the taking of the money nevertheless amounted to larceny, as she paid the money to the prisoner against her will, and because she as afraid.[1]

[Commins for prisoner; McConnell for Crown.]

Needy knife grinder.—The leading case was followed in R. *v.* Lovell (*t*), where a travelling grinder had by menaces extorted an excessive price from a woman in Worcestershire for the grinding of some knives.

Robbery. Accusation of infamy.—It is probable that the facts in these cases would not have sustained an indictment for *robbery*, enough intimidation not having been employed to constitute that crime (*u*). But before the statute referred to in the next leading case, the obtaining of money under a threat of *charging the prosecutor with sodomitical practices* had been held to be robbery (*x*); "the law considering the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury" (*y*).[2]

(*t*) 8 Q. B. D. 185.
(*u*) See R. *v.* Knewland and Wood. 2 Leach, 721.
(*x*) R. *v.* Donnally, 1 Leach, 193; and R. *v.* Hickman, 1 Leach, 278.
(*y*) Per Ashurst, J., in R. *v.* Knewland and Wood, *supra.*

[1] The doctrine as to securing property through fear or duress is that where one transfers the manual control of an article to another through fear, the larceny by such other, which constitutes part of the robbery is complete: 2 Bish. on Crim. Law, Sec. 807.

[2] State *v.* Bruce, 24 Me. 71.

[* 66] * *Threatening to Accuse.*

[48.] R. *v.* REDMAN.

[L. R. 1 C. C. R. 12 (1865).]

The prisoner threatened a boy's father that he would accuse the boy of having committed an abominable offence on a mare, unless the father bought the mare at the prisoner's price. It was held that he was guilty of threatening to accuse with intent to extort money, within the meaning of 24 & 25 Vict. c. 96, s. 47.[1]

[C. S. Bowen for Crown.]

Guilt or innocence immaterial. Bad law on the Western Circuit.—So gravely does the law regard the offence of threatening to accuse another of a serious crime (*r*), with intent to extort money, that the person found guilty of it may be sent into penal servitude for life. It is immaterial whether the person against whom the accusation is threatened be innocent or guilty if the prisoner intended to extort money (*s*); and, therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given even in cross-examination, by another witness, to prove that the prosecutor was guilty of such offence (*t*). A ruling of Mr. Justice Blackburn's on the Western Circuit, to the effect that the guilt or innocence of the prosecutor is material in considering whether, under the circumstances of the case, the intention of the prisoner was to extort money, or merely to compound a felony, is probably bad law (*u*).

Third person.—The threat to accuse need not be a threat to accuse before a judicial tribunal; a threat to charge before *any third person* is sufficient (*x*)

Threatening letters.—Sect. 44 of 24 & 25 Vict. c. 96, provides for the proper punishment (penal servitude for life as a maximum) of the person who sends a letter demanding, with menaces and without reasonable cause, any chattels, money, or other property.

Sending a letter threatening to murder a person, to burn down his house, or to maim his cattle, are felonies punishable with ten years penal servitude (*y*).[2]

(*r*) See 24 & 25 Vict. c. 96, s. 46, for list of such crimes.
(*s*) R. *v.* Gardner, 1 C. & P. 479.
(*t*) R. *v.* Cracknell, 10 Cox, C. C. 408.
(*u*) R. *v.* Richards, 11 Cox, C. C. 43.
(*x*) R. *v.* Robinson, 2 M. & R. 14.
(*y*) See 24 & 25 Vict. c. 97, s. 50 and 24 & 25 Vict. c. 100, s. 16.

[1] If the threat is to accuse of crime and the object is to extort money, it is immaterial whether the person threatened, is guilty or not; there is an attempt to prevert justice: 2 Bish. on Crim. Law, Sec. 1201.

[2] A letter threatening murder to extort money is indictable: State *v.* Patterson, 68 Me. 473; State *v.* Young, 26 Iowa, 122.

*Sovereign mistaken for Shilling. [* 67]

R. *v.* ASHWELL. [49]

[16 Q. B. D. 190 (1885).]

Drinking together one January evening at a public house in Leicestershire, Ashwell asked Keogh to come into the yard. There he requested Keogh to lend him a shilling. Keogh consented, gave Ashwell what both of them thought was a shilling, and then went home. Ashwell soon discovered that his friend had made a mistake, and that the coin in his possession was not a shilling, but a sovereign. Instead of returning it like an honest man, he fraudulently appropriated it to his own use, changing it the same night at another public house, and afterwards giving false and contradictory accounts as to how he had got it. On these facts (after conviction by a jury) it was held that the prisoner had not been guilty of larceny as a bailee,[1] and the judges were equally divided in opinion as to whether he had been guilty of larceny at common law. The conviction therefore stood.

"When Ashwell discovered," said Cave, J., "that the coin was a sovereign, he was, I think, bound to elect, as a finder would be, whether he would assume the responsibilities of a possessor; but at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use; and I am, therefore, of opinion that he falls within the principle of R. *v.* Middleton (*z*), and was guilty of larceny at common law."

[Sills for prisoner; A. K. Loyd for Crown.]

R. v. *Flowers.*—The leading case was distinguished and discussed in R. *v.* * Flowers (*a*), where a Leicester workman received some [* 68] money innocently, but afterwards fraudulently appropriated it. "If the judgments of the seven judges," said Lord Coleridge, C. J., "who affirmed the conviction in R. *v.* Ashwell are carefully read, it will be seen that there is a substantial difference between that case and the present, and that those judges were of opinion that, to justify a conviction for larceny, the receipt and appropriation must be contemporaneous." "I am of the same opinion," said Manisty, J., "and am glad that the opportunity has occurred for stat-

(*z*) L. R. 2 C. C. R. 45.
(*a*) 16 Q. B. D. 642.
[1] See note to R. *v.* Middleton.

ing the substance of the decision in R. *v.* Ashwell. The difference of opinion amongst the judges in that case was founded on the facts of the case, and on the application to those facts of the settled principle of law, that innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny. Some of the judges thought that the facts of that case did not show an innocent reception of the sovereign, and said that it was larceny; others thought that the reception was innocent, and held that it was not larceny. I am glad to think that the old rule of law still exists in its entirety." "The old rule of law," said Sir Henry Hawkins, "was never really questioned in R. *v.* Ashwell. This case is altogether different."

Mistake of Post Office Clerk.

[50.] **R. *v.* MIDDLETON.**

[L. R. 2 C. C. R. 38 (1873).]

The prisoner was a depositor in the post office savings bank at Notting Hill, where the sum of 11*s.* stood to his credit. He made arrangements for withdrawing 10*s.* of it, and went to the post office for the purpose. Unfortunately, the clerk referred to the wrong letter of advice, and, instead of handing the customer his 10*s.*, put down £8: 16*s.* 10*d.* on the counter. The prisoner took up the money, and went off, having at the moment [*69] of *taking it up an *animus furandi*, and knowing the money to be the money of the Postmaster-General. By eleven against four, the judges decided that the prisoner was guilty of larceny.[1]

[Sir J. D. Coleridge, A.-G., Metcalfe, and Slade for Crown.]

View of minority.—The ordinary lay reader will wonder why there should have been a shadow of doubt about Middleton's being guilty of larceny, since he clearly intended to steal somebody else's money. But the ground on which the opinion of the four judges, who considered him not guilty, proceeded was, that the clerk had a general authority to part with the property in the money, and that he intended, although acting under a mistake, to part with such property to the prisoner at the time he handed over the money to him, and that, having such general authority and such inten-

[1] Where a person obtains money which he knows has been paid to him by mistake, and he conceals and appropriates it, it is larceny: Wolfstein *v.* People, 13 N. Y. Supreme (N. S.), 121; Bailey *v.* State, 58 Ala. 414.

tion, and acting upon them, there was no felonious taking by the prisoner, without the consent and against the will of the owner.

"*Ringing the changes.*" *R.* v. *Hollis.*—The swindle called "ringing the changes" may be alluded to here. Two men went to an inn in Worcestershire, and, by a series of tricks, fraudulently induced the barmaid to pay over moneys of her master to them, without having received from them in return the proper change. The barmaid had, of course, no authority to pay over money without receiving the proper change, and was completely taken in by the men. It was held that they were guilty of larceny (*b*). "I cannot see," said Lord Coleridge, C. J., "If a person goes into a place and fraudulently, by a series of tricks, obtains possession of property from another, which that other has no intention of parting with, how the offence can fail to be larceny."[1]

Larceny by Finding.

R. *v.* GLYDE. [51.]

[L. R. 1 C. C. R. 139 (1868).]

The prisoner found a sovereign on the highway, believing it had been accidentally lost. Knowing he was doing * wrong, he at once made up his mind to keep it, whether [* 70] he found out who had lost it or not, and, on the owner being soon afterwards discovered, he refused to give it up. There was no evidence to show that the prisoner believed he could find the owner at the time he found the sovereign, and it was held, on the authority of R. *v.* Thurborn (*c*), that he was not guilty of larceny.[2]

Knowing owner. *R.* v. *Lamb.*—"If," however, "a person picks up a thing, and knows that he can immediately find the owner, but instead of restoring it to the owner, converts it to his own use, this is felony" (*d*).[3] Where, for

(*b*) R. *v.* Hollis, 12 Q. B. D. 25.
(*c*) 1 Der. C. C. 387.
(*d*) Per Parke, J., in R. *v.* Pope, 6 C. & P. 346.

[1] A fraudulent taking of property by trick or contrivance, unaccompanied by violence, is not robbery but larceny: Shinn *v.* State, 64 Ind. 13; Huber *v.* State, 57 Ind. 341.

[2] A man cannot be convicted of larceny unless he know the owner of lost property at the time of finding, or the goods have some marks to ascertain who is the owner: Tanner *v.* Comm., 14 Gratt. 635; People *v.* Anderson, 14 Johns. 294; Tyler *v.* People, 1 Ill. 293.

[3] It is larceny to retain or appropriate lost property, when the finder knows or has the means of knowing the owner: Comm. *v.* Titus, 116 Mass. 42; State *v.* Weston, 9 Conn. 527; Lane *v.* People, 10 Ill. 305.

instance, a gentleman left a trunk in a hackney coach, and the coachman, taking it, converted it to his own use, this was held to be larceny; for the coachman must have known where he took the gentleman up and where he set him down, and ought to have restored his trunk to him (*e*).

Altering mind.—In order, however, to convict the finder of property of larceny, it is essential that there should be evidence of an intention to appropriate the property *at the time of finding.* If at that time his intentions were honest, his subsequently altering his mind and deciding to keep the chattel, no matter who might be the owner: would not make him legally a thief (*f*).

Larceny by Bailee.

[52.] R. *v.* WYNN.

[16 Cox, C. C. 231 (1887).]

The prisoner was a travelling watchmaker, and on two separate occasions received from different persons watches to repair. One of the watches was pledged by him in November, 1886, and the other about a month later. When pledging the first [* 71] watch, the prisoner said he *only * wanted the money temporarily,* and, when pledging the second, he requested the person with whom he pledged it (a commission agent of East Grinstead) *not to part with it, as it was not his property.* It was held that there was some evidence here of a fraudulent conversion, and that the conviction ought to be affirmed.[1]

[No counsel appeared.]

Conversion must be fraudulent—The mere fact of a bailee's pawning the goods committed to his care is not of itself enough to bring him within 24 & 25 Vict. c. 26, s. 3. It is necessary for the prosecution not only to show a conversion (see Syeds *v.* Hay, 4 T. R. 260, and Wilbraham *v.* Snow, 2 Saund. Rep. 102), but also a *fraudulent conversion*, and the jury might possibly think, under the circumstances of any particular case, that although the prisoner had acted wrongly and foolishly, yet that he had had no intention to deprive the owner altogether of his goods. In the leading case the jury had distinctly negatived such a merciful construction of the watchmaker's intention.

(*e*) R. *v.* Lamb, 2 East, P. C. 664.

(*f*) R. *v.* Christopher, 28 L. J. M. C. 35.

[1] A bailee may be indicted for larceny in converting property to his own use, or of disposing of it to the injury of the owner: People *v.* Smith, 23 Cal. 280; McCoy *v.* State, 15 Ga. 208.

Person Employed to sell appropriating Money Received.

R. *v.* DE BANKS. [53.]

[13 Q. B. D. 29 (1884).]

The prisoner was employed by the prosecutor to sell a mare at Chester fair. This he did, but, having done so, he absconded with the money without accounting. It was held that he was guilty of larceny as a bailee, because he ought to have handed over *the particular money he received*, and had no right to mix it with his own.[1]

[No counsel appeared.]

Doubtful decision.—The soundess of this decision, however, is not free from doubt. All the judges expressed their sense of the difficulty of the case, and Mr. Justice Stephen dissented, saying, "My view is, that the man who has been convicted was not the bailee of the money. I think he received the money with no obligation to return the * identical coins, [*72] and that the present case is governed by R. *v.* Hassall" (*g*).

R. v. *Hassall.*—In Hassall's case (*g*), it may be remarked—the case of a "money club" at Sheffield—it was held that the bailment intended by 20 & 21 Vict. c. 54, s. 4, is a deposit of something to be returned in specie, and therefore that a person with whom money has been deposited, and who is under an obligation to return *the amount, but not the identical coins* deposited, is not a bailee of the money within the meaning of the section.

See also the recent case of R. *v.* Tonkinson (*gg*).

Infant may be guilty of Larceny by a Bailee.

R. *v.* McDONALD. [54.]

[15 Q. B. D. 323 (1885).]

The prisoner was a young fellow of eighteen or nineteen, who was supplied with a quantity of furniture, under a hiring agreement, by Mr. Brown, draper and furniture broker, of Torqua. After paying three or four of the instalments as required, the young man fraudulently removed and sold the goods. It was

(*g*) L. & C. 58.

(*gg*) 14 Cox, C. C. 603.

[1] In case of mixing funds to make out larceney, it must appear to be fraudulent, and with intent to deprive the owner: Snell *v.* State, 50 Ga. 219; that the money is not distinguishable will not prevent a conviction: People *v.* Williams, 24 Mich. 156.

held that, nothwithstanding his infancy, he was rightly convicted of larceny by a bailee, under 24 & 25 Vict. c. 96, s. 3.[1]

"It seems to me," said Lord Coleridge, C. J., "that undoubtedly the prisoner, though a minor, had the special property in, or right of possession of, these goods which was contemplated by those who framed this enactment when they used the term 'bailee;' that, having such special property, he proceeded to abuse it and fraudulently to convert the goods to his own use; and that he is therefore guilty of the offence created by the section. He is guilty of the offence, *not because he has broken a contract*, which he was incapable of making, but because, being [* 73] * capable of becoming a bailee of these goods, and having become one, he dealt with the goods in such a manner as by the terms of the Act to render him guilty of the crime of larceny."

[Hon. Bernard Coleridge for prisoner; McKellan for Crown.]

Married Woman.—A married woman may be a bailee within the meaning of 24 & 25 Vict. c. 96, s. 3 (*h*).

Infant trader.—In R. *v.* Wilson (*i*), it was held that since the passing of 37 & 38 Vict. c. 62 (The Infants' Relief Act, 1874), an infant could not be convicted of appropriating any part of his property, "which ought by law to be divided amongst his creditors," where the debts proved against his estate were only trade debts, and it did not appear that there were any debts for necessaries supplied to him.

Stealing from Co-partners.

[55.] **R. *v.* ROBSON.**

[16 Q. B. D. 137 (1885).]

The object of the Bedlington Colliery Young Men's Christian Association was "the extension of the Kingdom of the Lord Jesus Christ among young men, and the development of their

(*h*) R. *v.* Robson, L. & C. 93.

(*i*) 5 Q. B. D. 28.

[1] In People *v.* Davis, Wheeler C. C. 230 (1823); there was an indictment for larceny, the defendant not being fourteen years old by a few weeks; the taking was proved but no evidence was offered of his capacity to commit crime, and the jury was instructed that the law presumes an infant under fourteen incapable of committing crimes and in order to show his liability, it was necessary to "prove his capacity."

As to infant's liability in cases of murder: State *v.* Guild, 5 Halsted, 163 (1828); State *v.* Aaron, 1 Southard (1818).

spiritual life and mental powers." It was held that this was not a "co-partnership" within the meaning of 31 & 32 Vict. c. 116, s. 1, and, therefore, that the conviction of the prisoner, a member of the B. C. Y. M. C. A., for appropriating some of its money as a co-partner, must be quashed.[1]

"I cannot find," said Lord Coleridge, C. J., "any authority throwing any doubt on the accuracy of the passage in Lindley on Partnership, which makes the participation in profits essential to the English idea of partnership,[2] and states that, although in former times the word co-partnership * was used in [* 74] the sense of co-ownership, the modern usage has been to confine the meaning of the term to societies formed for gain."

[Walton for prisoner.]

Not indicted properly.—It is to be observed that in this case the only question reserved was, whether the Association was a "co-partnership." The prisoner was not indicted, as he ought to have been, as one of several joint beneficial owners.

Receiving.—It is not a crime, punishable under sect. 91 of 24 & 25 Vict. c. 96, to receive stolen goods, knowing them to have been stolen, if the stealing is not a crime either at common law or under 24 & 25 Vict. c. 96, although the stealing is a felony under 31 & 32 Vict. c. 116, s. 1 (*z*).

Attempt to Steal.

R. *v.* COLLINS. [56.]

[L. & C. 471 (1864).]

The prisoner was indicted for attempting to pick a lady's pocket. There is no doubt he had put his hand in the pocket with a guilty intention, (*a*), but *it did not appear that there was anything inside*, and on this ground it was held that he was entitled to have his conviction quashed.[3]

[Poland for prisoner; Metcalfe for Crown.]

(*z*) R. *v.* Smith, L. R. 1 C. C. R. 266.

(*a*) The prisoner's counsel explained that his doing so was "a mere voyage of discovery."

[1] Napolean *v.* State, 3 Tex. App. 522 (1878); Jones *v.* State, 76 Ala. 8 (1884).

[2] Richmond *v.* Judy, 6 Mo. App. 465 (1879); Ash *v.* Guie, 97 Pa. 493 (1881); Burt *v.* Lathrop, 52 Mich. 106 (1883).

[3] It is larceny to thrust the hand into another's pocket, seize the pocket

R. v. McPherson.—There can only be an attempt to commit an act when there is such a beginning as, if uninterrupted, would end in the completion of the act. Thus in R. *v.* McPherson (*b*), it was held that the prisoner could not be convicted of breaking and entering a dwelling-house and attempting to steal certain specified articles inside if those particular articles were not there, though there might be other goods of the prosecutor in the [* 75] house. "I think," said * Cockburn, C. J., "attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged. Here the attempt never could have succeeded, as the goods which the indictment charges the prisoner with stealing had been already removed —stolen by somebody else." "Suppose a man," said Bramwell, B., "believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?"

A butcher boy's little game.—But, in another case (*c*), the prisoner was entrusted by his master with some meat which was to be weighed out and delivered to a customer. By means of a false weight he kept back a part of the meat with intent to steal it; but the fraud was discovered before he had actually moved away with it. It was held that he was rightly convicted of an attempt to steal the meat.

It is to be observed that, although under the circumstances of the leading case there is no attempt to steal, yet the prisoner is guilty of a common law misdemeanour, and the indictment should be so drawn as to meet this view of the case.

Receiving Stolen Goods.

[57.] **R. *v.* SCHMIDT.**

[L. R. 1 C. C. R. 15 (1866).]

Some thieves stole goods from the custody of the London, Brighton and South Coast Railway Company at the Arundel station, and afterwards sent them in a parcel by the same company's line addressed to the prisoner at Brighton. During the transit the theft was discovered, but, for the purposes of detec-

(*b*) Dears. & B. 197.
(*c*) R. *v.* Cheeseman, L & C. 140.

book and lift it three inches from the pocket: Flynn *v.* State, 42 Tex. 301; Harrison *v.* People, 50 N. Y. 518.

The American Law seems to be that though there is nothing in the pocket at the time, yet the attempt to commit larceny is complete: Rogers *v.* Comm., 5 S. & R. 463; Comm. *v.* McDonald, 6 Cush. 365; Josslyn *v.* Comm., 6 Metc. 236.

tion the parcel was delivered to the prisoner as addressed. It was, held, however, that the prisoner could not be convicted of receiving the goods knowing them to have been stolen, because the goods had got back into *the possession of [* 76] the owner *so as to be no longer stolen goods.*[1]

[Pearce and Willoughby for prisoner; Hurst for Crown.]

Trap for Receiver.—So, in R. *v.* Hancock (*d*), where some stolen cigars were, on the discovery of the theft, restored to the thief in order to catch the receiver, it was held that the latter could not be convicted, the cigars not being stolen property at the time they were received.

Receiver denying guilt of thief.—A person charged with receiving stolen goods may controvert the guilt of the principal felon, even after conviction, and though that conviction is stated in the indictment (*e*). Thus, where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared, on the cross-examination of the prosecutor, that, in fact, the party convicted had only been guilty of a breach of trust, the prisoner was acquitted (*f*).

"*Recent Prosecution.*"

R. *v.* **RITSON.** [58.]

[15 Cox, C. C. 478 (1884).]

The prisoner was charged with receiving some leather, knowing it to have been stolen. His account of it, given at the time when the leather was found in his possession, was, that he had bought it from a Mr. Reeves, who was a tradesman in the same town. It was held that it was not necessary for the prosecution to call this gentleman, because there were other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story.

(*d*) 14 Cox, C. C. 119; and see R. *v.* Dolan, Dears. C. C. 436.
(*e*) Fost, 365. (*f*) R. *v.* Smith, 1 Leach, 288.

[1] Whar. Crim. Law Sec. 990 and notes.

As a general rule, possession by the defendant of stolen goods raises a reasonable presumption that he is guilty of stealing them. The possession, however, must be recent: Hughes *v.* State, 8 Humph. 75; State *v.* Merrick, 19 Me. 398; Warren *v.* State, 1 Greene (Iowa), 106; Jones *v.* State, 26 Miss. 247; must be unexplained and the goods must be under the defendant's exclusive control: Jones *v.* People, 12 Ill. 259.

There must be a severance from the possession of the owner and the least removal with intent to steal is sufficient: Eckles *v.* State, 20 Ohio, 508; State *v.* Jones, 65 N. C. 395.

"It is clear," said Grove, J., "there was *sufficient evidence in this case without calling* the tradesman mentioned by the [* 77] prisoner. To hold otherwise would be to hold that * in every case, however strong the circumstances might be against the prisoner, if he said he had received the goods from a third party, that party must be called; but that cannot be laid down as necessary."

[Gill for prisoner.]

Presumption from recent possession. Giving a name.—The doctrine of "recent possession," which is that when a person is found in possession of stolen property shortly after it has been stolen, and is unable to give any reasonable or probable account of how he became possessed of it, he is presumed to have come by it dishonestly, is obviously one to be applied with great caution and forbearance. On the one hand, it is very easy for a prisoner to say that he got the goods from a person whom he had never seen before and has never seen since, that he paid a fair price for them, and that he had not the slightest idea they were stolen; but, on the other hand, that may really be the true explanation. When, therefore, he goes so far as actually to name the person from whom he purchased them, it is generally incumbent on the prosecution to secure his presence in order to show the falsehood of the prisoner's assertion. "It must be a question, however, in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner" (*g*). The case for the prosecution may be so clear that justice may be done to the prisoner without such evidence being given.[1]

"*Other Property Stolen.*"

[59.] **R. *v.* CARTER.**

[12 Q. B. D. 522 (1884).]

The prisoner was indicted for stealing a mare, the property of Alfred Smith, on the 20th of May, 1883, and there was a second count for receiving. It was shown that he was in posses- [* 78] sion of it shortly after it had been stolen, * for he sold it on or about May 26th. It was held that evidence could not be given by the prosecution to the effect that a few days be-

(*g*) Per Stephen, J., in the leading case.

[1] The receiver of stolen goods must have knowledge that the goods were stolen to be convicted: Andrews *v.* People, 60 Ill. 354; Collins *v.* State, 33 Ala. 434; he is guilty if he received the goods under circumstances to satisfy a man of ordinary caution that the goods were stolen: Comm. *v.* Finn, 108 Mass. 466.

fore May 20th the prisoner had been selling another mare which had been stolen from one Harry Broyd on the 22nd of October, 1882. The 19th section of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), requires that the "other property stolen," of which evidence can sometimes be given, must have been actually in the possession of the prisoner at the time when he was found in possession of the property mentioned in the indictment.

[Wedderburn for prisoner; Grubbe for Crown.]

* *R. v. Drage.*—The same ruling had been given a few years before by Bramwell, L.J., on the Midland circuit (*h*), and no doubt it is the correct view of the section. But it is perhaps to be regretted that, when the only question in issue is the guilty knowledge of the prisoner,[1] the legislature did not clearly provide that the fact of his having been *at any time* in possession of other property stolen within the preceding period of twelve months should be regarded as relevant and material.

Another indictment.—Upon the trial of an indictment for larceny and receiving, evidence of "other property stolen" may be given under the Act, although such other property is the subject of another indictment against the prisoner (*j*).

Previous conviction.—It may be mentioned that the 19th section of the Prevention of Crimes Act, 1871, also provides that, when a person is charged with receiving stolen goods, evidence of his having been convicted during the preceding five years of "any offence involving fraud or dishonesty" may be given against him at any stage of the proceedings, provided he has had seven days' notice in writing of the prosecution's intention to bring up such previous conviction against him.

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*Embezzlement—"Clerk or Servant." [*79]

R. *v.* NEGUS. [60.]

[L. R. 2 C. C. R. 34 (1873).]

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money,

(*h*) R. *v.* Drage, 14 Cox, C. C. 85.
(*j*) R. *v.* Jones and Haynes, 14 Cox, C. C. 3.

[1] Goods found soon after property has been stolen, either on the prisoner's person or in his house, gives rise to the presumption that he is guilty: Penna. *v.* Myers, Addis. 320; State *v.* Brewster, 7 Vt. 118; State *v.* Jones, 2 Devx. & Bat. 544; State *v.* Williams, 9 Ired. 140; State *v.* Weston, 9 Conn. 527; State *v.* Clark, 4 Strobh. 311; State *v.* Hughes, 8 Humph. 75.

but, if any was paid to him, he was to hand it over at once to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty, he applied for payment of a certain sum, and, having received it, he applied it to his own purposes, and denied that it had been paid to him. On these facts it was held that the prisoner was not a "clerk or servant," and could not be convicted of embezzlement under 24 & 25 Vict. c. 96, s. 68.

"The test," said Blackburn, J., "is very much this, viz: *whether the person charged is under the control, and bound to obey the orders of his master.* He may be so without being bound to devote his whole time to this service; but, if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance by itself alone enables us to say that he was a servant of the prosecutor."

[F. F. Lewis for Crown.]

"*Clerk or servant.*"—A person indicted for embezzlement must be shown either to have been "*a clerk or servant,*" or, at all events, to have [*80] been *"*employed for the purpose, or in the capacity, of a clerk or servant.*"* [1]

Son may be clerk.—A son who lives with his father, and performs for him duties usually performed by a clerk, is within the statute, though he receives no salary, and though there is no contract binding him to go on doing those duties (*j*). "If it had been necessary," said Pollock B., "to say absolutely that the prisoner was a clerk or servant, I should have hesitated. But I think the words 'employed for the purpose, or in the capacity, of a clerk or servant' are wider, and that there is evidence to bring the case within them."

Not confined to trade.—The statute is not confined to the clerks and servants of persons in trade, but extends to the clerks and servants of all persons whatsoever if they are employed to receive money, etc. (*k*).

Mode of payment immaterial. R. v. *Bailey. R.* v. *Bowers.*—The mode by which the prisoner was remunerated for his service is immaterial. Thus, a commercial traveler who is paid by commission only, getting no definite salary whatever, is within the statute *if he is bound to go where his employer*

(*j*) R. *v.* Foulkes, L. R. 2 C. C. R. 150.
(*k*) R. *v.* Squire, R. & R. 349.
[1] A clerk leaving, taking the amount due him, and entering the same on the books is not guilty of embezzlement: Ross *v.* Irvine, 35 Ill. 487.

tells him, and to devote his whole business time to his service (*l*). But where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect moneys in connection with his orders, but was *at liberty to dispose of his time as he liked, and to get or abstain from getting orders as he chose*, he was held not to be "clerk or servant" (*m*).

Employment need not be permanent.—It is not necessary that the employment should be of a permanent kind. Thus, where a drover, who was employed to drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was held to be a servant (*n*).

Treasurer of friendly society.—A mere unpaid treasurer of a friendly society is not a clerk or servant of the trustees in whom the moneys of the society are vested, and cannot be indicted for embezzlement (*o*). "I believe that there is no case," said Bovill, C. J., "to show that the treasurer of a friendly society can be indicted for embezzlement. The essence of the indictment in this case is, that the prisoner was a clerk or servant of the trustees. The trustees have all moneys of the society vested in them by Act of Parliament, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant.

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* *Embezzlement by Assistant Overseer.* [*81]

R. *v.* COLEY. [61.]

[16 Cox, C. C. 226 (1887).]

The prisoner was indicted for embezzling the moneys of the inhabitants of the township of Hasbury, in Worcestershire, while acting as assistant overseer. His nomination, however, to that office did not specify as one of the duties he was to perform the duty of collecting or receiving money, and it was held that, inasmuch as under 59 Geo. 3, c. 12, s. 7, an assistant overseer can only be appointed by justices for such purposes as are specified in the nomination, he could not be convicted of embezzling rates collected by him as clerk or servant of the inhabitants within the meaning of 24 & 25 Vict. c. 95. s. 68.

[Amphlett for prisoner ; Cranstoun for Crown.]

R. v. *Hall.*—This is an important decision if it is allowed to stand ; but it is difficult to see how it is reconcilable with R. *v.* Hall (*p*) and other cases.[1]

(*l*) R. *v.* Bailey, 12 Cox, C. C. 56; and see R. *v.* Tite, L. & C. 29.
(*m*) R. *v.* Bowers, L. R. 1 C. C. R. 41.
(*n*) R. *v.* Hughes, 1 Moo. C. C. 370.
(*o*) R. *v.* Tyree, L. R. 1 C. C. R. 181; and see R. *v.* Diprose, 11 Cox, C. C. 185. (*p*) 1 Moo. C. C. 474.

[1] A collector of pew-rents entitled to a commission out of the collections,

Embezzling Funds of Unregistered Friendly Society.

[62.] **R. *v.* STAINER.**

[L. R. 1 C. C. R. 230 (1870).]

The prisoner was local secretary of an unregistered friendly society, some of whose rules were in restraint of trade, and it was contended that, for that reason, he could not be convicted of embezzling the funds of the society. It was held, however, [* 82] that, while such rules may be void * as being against public policy, they are not criminal, and therefore that the conviction was proper.

[Streeter and Jelf for prisoner; J. O. Griffiths for Crown.]

Unlawful oath.—In R. *v.* Hunt (*q*), however, it was held that a person could not be convicted of embezzlement as clerk or servant to a society which, in consequence of administering an unlawful oath to its members, was an unlawful combination and confederacy.

Existing Fact in False Pretences.

[63.] **R. *v.* COOPER.**

[2 Q. B. D. 510 (1877).]

The prisoner was indicted for having obtained a quantity of potatoes by the false pretences that he was a potato dealer in a large way, and able to pay for large quantities of potatoes supplied to him. The only evidence of these pretences was the following letter from him to the prosecutor:—

"*Hamerton, Sheffield,*

"*Dear Sir,* "*January* 17*th*, 1877.

"*Please send me one truck of regents and one truck of rocks as sample, at your prices named in your letter. Let them*

(*q*) 8 C. & P. 642.

if he converts them to his own use is not guilty of embezzlement: State *v.* Kent, 22 Minn. 41; see Comm. *v.* Stearns, 2 Metc. 343; Comm. *v.* Libby, 11 Id. 64; Comm. *v.* Foster, 107 Mass. 221.

be good quality, and then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice.

"*Yours truly,*

"*William Cooper.*

"*P.S.—I may say, if you use me well, I shall be a good customer. An answer will oblige saying when they are put on.*"

* It was held that this letter reasonably conveyed to the [*83] mind the construction put upon it in the indictment, and that the false pretences alleged were proved.

"The question in all these cases," said Lord Coleridge, C. J., "is *what was intended to be conveyed to the mind* of the prosecutor by the acts, conduct, or silence of the prisoner.[1] If a particular idea is intended to be conveyed to his mind, and is conveyed, and if it be false, the statute is complied with."

[Sanderson Tennant for prisoner; Frank Lockwood for Crown.]

R. v. *Barnard.*—So in the famous case of the *sham undergraduate* (*r*) it was held that if a person at Oxford, who is not a member of the University, goes to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtains goods, his appearing in cap and gown is a sufficient false pretence to satisfy the statute, although he does not say anything.[2]

Worthless cheque. R. v. *Hazelton. Sanguine but not criminal.*—So, also, if a person obtains goods from another by giving his cheque upon a banker with whom in fact he has no account, and having no reason to suppose his cheque will be honoured, this is an obtaining by false pretences (*s*). In R. *v.* Hazelton (*t*), it was said by Lush, J., "I think giving a cheque is not a representation that the giver then has funds in the bank to the amount of the cheque. Many a man draws a cheque, either intending to pay in money

(*r*) R. *v.* Barnard, 7 C. & P. 784.

(*s*) R. *v.* Jackson, 3 Camp. 370.

(*t*) L. R. 2 C. C. R. 134. In this case the prisoner had formerly had an account at the bank, but he knew that it was virtually closed, and that his cheques would not be paid.

[1] Four elements enter into and constitute the offence: First, an intent to defraud; second, an act committed; third, a false pretence; fourth, the fraud must be committed by the false pretence: Comm. *v.* Drew, 19 Pick. 179. An indictment for false pretence must aver a false assertion of a material fact, knowing its falsity: Jones *v.* State, 50 Ind. 473; People *v.* Tomkins, 1 Parker, Crim. Rep. 224. It is similar to larceny in that there must be an attempt to deprive the owner wholly of his property; and differs in that it is taken with the consent of the owner. As to false pretences to obtain credit: Comm. *v.* Burdick, 2 Pa. St. 163; People *v.* Hendricks, 13 Wend. 87; Comm. *v.* Walker, 108 Mass. 309.

[2] A designed mis-statement of one's condition, by which goods are obtained, is within the statute: State *v.* Phifer, 65 N. C. 321; as falsely assuming the dress of a college student: Comm. *v.* Daniel, 2 Pars. Cas. 332; or pretending to be a clergyman: Thomas *v.* People, 34 N. Y. 351.

to meet it, or having a right to overdraw. But here the prisoner, when he obtained the goods, said that he *wished to pay ready money;* and that amounts to a representation that the cheque was equal to cash, whereas he had no real account at the bank at all." But a man who gives a cheque on a bank where he has no account at the time he gives it, must not be convicted of false pretences if he was honestly in the expectation of there being funds to meet the cheque at the time of its presentment (*u*).[3] Such a person may have acted rashly and foolishly, but he had no intent to defraud.

Flash notes.—Fraudulently offering a "flash note" in payment, [*84] under * pretence that it is a good bank note, is a false pretence within the statute (*x*).

Word competitions. R. v. *Randell.*—The leading case was followed in the very recent case of R. *v.* Randell (*y*), where the defendant's particular line of swindling was the advertising of sham "word competitions" in newspapers. "The advertisement," said Lord Coleridge, C. J., "was clearly intended to convey that there was such a person as the 'Rev. A. Brient,' and that he had instituted a word competition for which a prize was to be given, and that the proceeds were to be devoted to one of the charitable institutions of Dr. Barnardo, all which was pure invention, and made for a purpose which is quite plain. The person who put forth such pretences, and who received money by means of such pretences, which he knew to be false, is guilty of obtaining money by means of false pretences. This is the effect of all the authorities, and especially of R. *v.* Cooper."

See also the recent case of R. *v.* Powell (*yy*), where the conviction of the fraudulent agent of a life assurance company was affirmed.[4]

Promissory False Pretences.

[64.] **R. *v.* JENNISON.**

[L. & C. 157 (1862).]

The prisoner was indicted for obtaining 8*l.* from a servant girl

(*u*) R. *v.* Walne, 11 Cox, C. C. 647.
(*x*) R. *v.* Coulson, 1 Den. 592.
(*y*) Times Law Reports, Dec. 10th, 1887.
(*yy*) 15 Cox, C. C. 568.

[3] Obtaining goods on a check, knowing it would not be paid; or falsely declaring a post-dated check to be genuine; or that it will be paid on presentation when there are no funds to meet it, are all within the statute: Lesser *v.* People, 73 N. Y. 78; Foote *v.* People, 17 Hun. 218; Comm. *v.* Collins, 8 Phila. 609; Maley *v.* State, 31 Ind. 192.

[4] Any false representation of the status of the defendant is within the statute: State *v.* Tomlin, 5 Dutch. 13; State *v.* Kube, 20 Wis. 217.

by false pretences; the false pretences being that he was an unmarried man, that he would marry the prosecutrix, and that with the money she was to give him he would furnish a house at Liverpool for them to live in. It was held that the prisoner could be properly convicted, because though two of the false pretences alleged were merely promises relating to things to be done in the future, the statement that he was unmarried was a false pretence as to an existing fact, without making which he would not have got the money.[1]

[No counsel appeared.]

Going to pay his rent. Assertion of power implied. Bringing back husband. New directory coming out.—A promissory false pretence cannot be made the subject of an * indictment.[2] To constitute the crime of [* 85] obtaining by false pretences, the pretence must be of an *existing fact;*[3] and so where the prosecutor lent 10*l.* to the prisoner on the false pretence that he was going to pay his rent, it was held that there could be no conviction, for the prisoner's representations related merely to his future conduct (*z*). But such representations may render the person who makes them criminally liable if they imply an assertion of his *power* to carry them out, as in a case where the prisoner used only promissory words about bringing back a woman's husband (who had run away) "over hedges and ditches," but implied that she had *power* to bring him back (*a*). And where money was obtained by the defendant by the false representation that Messrs. Warrinor & Co. were about to publish a new directory, and that the defendant was collecting information for it, this was held to be a false pretence of an existing fact (*b*). "At the time the money was obtained," said Lord Coleridge, C. J., "the representation was false, and it was not the less a false pretence because at a future time the prisoner might have brought out a new directory with the title of Warrinor & Co.'s Directory."

(*z*) R. *v.* Lewis Lee, 9 Cox, C. C. 304.
(*a*) R. *v.* Giles, L. & C. 502.
(*b*) R. *v.* Speed, 15 Cox, C. C. 24.

[1] State *v.* Mage, 11 Ind. 154; Glacken *v.* Comm., 3 Met. (Ken.) 232.

[2] A mere falsehood is not sufficient to maintain the indictment: Comm. *v.* Warner, 6 Hill, 72; Jones *v.* U. S., 5 Cranch, C. C. 653; State *v.* Mills, 17 Me. 211.

[3] The essence of the offence is that the false pretence should be of a past event or of a fact having a present existence, and not of something to happen in the future: Kelber *v.* State, 51 Ind. 111; Comm. *v.* Drew, 19 Pick. 179; State *v.* Rowley, 12 Conn. 101; Lesser *v.* People, 12 Hun. 668; Ranney *v.* People, 22 N. Y. 413.

Intent to Defraud in False Pretences.

[65.] **R. *v.* NAYLOR.**

[L. R. 1 C. C. R. 4 (1865).]

In this case the prisoner had been found guilty of obtaining some carpets by false pretences, and the conviction was held to be right, notwithstanding that he had *intended to pay* for the carpets when it should be in his power to do so.[1]

[No counsel appeared.]

Intent to defraud.—Though, to constitute the misdemeanour of obtaining money or goods by false pretences, there must always be an *intent to defraud*, that intent may be *implied* sufficiently from the facts of the case.[2]

[*86] * *How to get payment of a debt.*—But in R. *v.* Henry Williams (*c*), where the prosecutor, Peter Williams, owed John Williams, the prisoner's master, a sum of money of which it seemed impossible to get payment, and the prisoner, to secure to his master the means of paying himself, went to the prosecutor's wife in her husband's absence, and falsely told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, whereupon the prosecutor's wife, believing the story, delivered the sacks to him, it was held that if the prisoner's intention was not to defraud Peter Williams, but *merely to put it into his master's power to compel him to pay a just debt*, there ought not to be a conviction for false pretences. "It is not sufficient," said the Court, "that the prisoner knowingly stated that which was false, and thereby obtained the malt; you must be satisfied that the prisoner at the time intended to defraud Peter Williams."

Indictment.—An indictment for false pretences must contain the words "intent to defraud," and if they are omitted, it cannot be amended (*cc*).

(*c*) 7 C. & P. 354.

(*cc*) R. *v.* James, 12 Cox C. C. 127.

[1] Where the property is obtained by false pretences, neither the intention nor the ability to re-pay will deprive the act of its criminality: Comm. *v.* Coe, 115 Miss. 481; State *v.* Thatcher, 35 N. J. 445; Comm. *v.* Mason, 105 Mass. 163.

[2] To constitute the offence for false pretences, there must have been an intent to defraud in connection with the false representation calculated to mislead: Low *v.* Hall, 47 N. Y. 104; Fay *v.* Comm., 28 Gratt. 912; Brown *v.* Peoples, 16 Hun. 535.

Puffing not Indictable.

R. *v.* BRYAN. [66.]

[1 Dears. & B. 265 (1857).]

The prisoner succeeded in obtaining a substantial loan from a pawnbroker on some very inferior spoons by fraudulently and falsely representing them to be as good as "Elkington's A." spoons, to have as much silver on them, that the foundations were of the best material, &c., &c. It was held, however, that he could not be convicted of obtaining money by false pretences, because his statements were in the nature of "mere praise or exaggeration, or puffing."

"It seems to me," said Lord Campbell, C. J., "*it never could have been the intention of the legislature to make it an indictable offence for the seller to exaggerate the quality* * *of* [* 87] *that which he is selling*, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were . . . As yet, I find no case in which a mere misrepresentation at the time of sale of the quality of the goods has been held to be an indictable offence."

[B. C. Robinson and F. H. Lewis for prisoner; Hardinge Giffard for Crown.]

R. v. *Ardley.*—The later case of R. *v.* Ardley (*d*) does not in any way conflict with the leading case.[1] There the prisoner induced the prosecutor to buy a chain from him by fraudulently representing that it was 15-carat gold, when he knew very well it was only of a quality a trifle better than 6-carat. This was held to be a statement as to a specific fact within the knowledge of the prisoner, and therefore a sufficient false pretence to warrant a conviction.

The tea trade.—So, where the defendant falsely represented to the prosecutrix that certain packages which he sold to her contained good tea, whereas in fact they contained a mixture of which only one-fourth part in each package was tea, the remaining three-fourths consisting of sand and other articles unfit for food or drink, and the jury found that the defendant knew

(*d*) L. R. 1 C. C. R. 301.

[1] While a distinction may be drawn between the leading case and that of R. *v.* Ardley, yet they contain practically the same false representations, and the latter case in terms, though not expressly, overrules the leading case. See Reese *v.* Wyman, 9 Ga. 430; State *v.* Tomlin, 5 Dutch. (N. J.) 13.

the real nature of the contents of the packages, the conviction was held right (*e*).

Swindling a clerk.—Where the defendant pretended that he was carrying on an extensive business as a surveyor and house agent, and thereby induced the prosecutor to deposit with him 25*l.* as a security for his fidelity as a clerk, whereas, as a matter of fact, the defendant was not carrying on *any* business as a surveyor or house agent, he was held to be guilty of obtaining the money by false pretences (*f*).

Misrepresenting value of business.—But a false representation, though "grossly fraudulent," as to the value of a business, supposing the defendant was doing any business at all, will not sustain an indictment for false pretences (*g*).[1]

[*88] * *Prosecutor not deceived by False Pretence.*

[67.] **R. *v.* MILLS.**

[Dears. & B. 205 (1857).]

The prisoner was charged with obtaining money by the false pretence that he had cut sixty-three fans of chaff, when in fact he had only cut forty-five. It appeared by the evidence that the prisoner was employed to cut chaff at twopence per fan, and that on making the false pretence alleged in the indictment, he demanded 10*s.* 6*d.* from the prosecutor. The prosecutor had previously seen the prisoner remove eighteen fans from an adjoining place and add them to the heap which he pretended he had cut, but, notwithstanding this knowledge, he paid the prisoner the amount he demanded. It was held that there ought not to be a conviction, because the money had not been obtained by means of the false pretence.

"The test is," said Cockburn, C. J., "*what is the motive* operating on the mind of the prosecutor which induced him to part with his money?[2] Here the prosecutor knew that the pretence

(*e*) R. *v.* Foster, 2 Q. B. D. 301.
(*f*) R. *v.* Crabb, 11 Cox, C. C. 85.
(*g*) R. *v.* Williamson, 11 Cox, C. C. 328.

[1] A representation as to the value of a watch, is a mere matter of opinion and not within the statute: State *v.* Estes, 46 Me. 150. As to representations as to the value of a business: Comm. *v.* Jeffries, 7 Allen, 548.

[2] Intent is a question of fact for the jury and is an essential, part of the offence: People *v.* Kendall, 25 Wend. 399; Parmelee *v.* People, 8 Hun. 623; Brown *v.* People, 16 Id. 535; Troyden *v.* Comm., 31 Gratt. 872. The intent to defraud must be proved.

was false; he had the same knowledge of its falseness as the prisoner. It was *not the false pretence*, therefore, which induced the prosecutor to part with his money; and if it is said that it was parted with from a desire to entrap the prisoner, how can it be said to have been obtained by means of the false pretence ?"

[Orridge for Crown.]

In such a case as this, however, there can be a conviction for *attempting* to obtain (*h*).

The wrong Miss Jones.—In R. *v.* Jones (*i*) the prisoner went into a shop called London House, at Llanrwst, and asked for some goods, which were put * into a parcel for her. She said her name was Miss Jones [*89] of Cefn Shercam, Carnarvon, which was a lie. The Jones of Cefn Shercam did not know the prisoner, and never ordered any goods. It was held, however, that a conviction could not be supported, as the false pretence charged and proved was that the prisoner was the daughter of Miss Jones of Cefn Shercam, and there was *no evidence that the goods had not been delivered to the prisoner before her name and address were asked for.* "It must always appear," said Grove, J., "on an indictment for obtaining goods by false pretences, that the prosecutor parted with the goods *upon the faith of the false pretence alleged*,[2] and here that does not appear." "It is not enough," said Mathew, J., "to show that a false address was given if it does not appear that the goods were parted with on the faith of it."

Remoteness in False Pretences.

R. *v.* MARTIN. [68.]

[L. R. 1 C. C. R. 56 (1867).]

In this case the prisoner had by false pretences induced a wheelwright to make him a spring van, and it was held that a conviction for obtaining a chattel by false pretences is good, although the chattel is not in existence at the time the pretence is made, provided the subsequent delivery of the chattel is directly connected with the false pretence.

"It is absurd," said Bovill, C. J., "to say that the chattel obtained must be in existence when the pretence is made. The

(*h*) R. *v.* Roebuck, Dears. & B. 24.
(*i*) 15 Cox, C. C. 475.
[2] To constitute the offence, the false pretence must be the operative cause of the transfer of the property: Comm. *v.* Davidson, 1 Cush. 33.

pretence must, indeed, precede the delivery of the thing obtained; but at what distance of time? What is the test? Surely this, that there must be *a direct connection between the pretence and the delivery*,—that there must be a continuing pretence. Whether there is such a connection or not is a question for the jury . . .

In the present case, when the false pretence was made [*90] * and the order given, it was never contemplated that the matter should rest there; and we have no difficulty in holding that there was a continuing pretence, and a delivery obtained thereby."[1]

[Kennedy for prisoner.]

R. v. *Gardner.*—With the leading case should be compared the cases of R. *v.* Gardner (*l*), and R. *v.* Morris Bryan (*m*). In the former case the prisoner falsely represented himself to be a naval officer, and so obtained *lodging, but not board.* He subsequently, and without any fresh pretence, obtained articles of food, and was indicted for obtaining them by falsely pretending he was a naval officer. It was held that the obtaining of the articles of food was *too remotely the result* of the false pretence. Supposing, however, the obtaining of the food had been in the prisoner's contemplation at the time he made his false pretence, it is clear (notwithstanding the obvious misapprehension of the facts, both in the judgment of Jervis, C. J., and in the marginal note) that the conviction would have been right.

R. v. *Morris Bryan. Intervention of contract.*—In R. v. Morris Bryan (*m*), Mr. Justice Hill seems to have mistaken the real effect of R. *v.* Gardner (*l*), and to have thought that in such a case all that the prisoner obtains is *a contract.* The intervention of a contract, however, is not any defence if what the prisoner obtained under the contract was contemplated by him at the time he made his false pretence as *the intended and wished for result.* The question of remoteness is one for the jury, and they are not likely to be misled by any sophistries about the intervention of contracts.

How to win a swimming handicap.—In the recent case of R. *v.* Larner (*n*) the prisoner was charged with obtaining a prize in a swimming handicap at the Surrey County Baths by false pretences. He obtained his competitor's ticket for the race by falsely representing himself to be a member of a certain club, and by a forged letter purporting to be written by the secretary of that club. In this way the acute gentleman got twenty seconds start, and, being an excellent swimmer, won easily. It was held that the false pretences were too remote, and that, on that charge at all events, he could not be convicted.

(*l*) Dears. & B. 40.
(*m*) 2 F. &. F. 567.
(*n*) 14 Cox, C. C. 497

[1] Where the false pretence was too remotely connected with the fraud, the indictment will not be sustained. The test is the continuance of the pretence down to the time of delivery and the direct connection between the pretence and the delivery.

An honest foreman.—But in R. *v.* Greathead (*o*) the prisoner, who was a foreman at some works in Yorkshire, by means of a false wage-sheet obtained from his master a cheque for the amount stated in the sheet to pay * the men's wages. In consequence of its being informally [* 91] drawn, payment was refused at the bank. Thereupon the prisoner returned the cheque to the prosecutor, and told him of the omission. The prosecutor tore up the cheque, and drew another, which he gave to the prisoner. The prisoner cashed the second cheque, and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. It was held that the false pretence upon which the first cheque was given *continued* in force, and was the acting motive which influenced the prosecutor's mind in giving the second cheque.

See, also, the recent case of R. *v.* Burton (*p*), where the charge was one of obtaining food and lodging by false pretences.

Hiring a Horse by False Pretences.

R. *v.* KILHAM. [69.]

[L. R. 1 C. C. R. 261 (1870).]

The prisoner called one day at the livery-stables of Messrs. Thackray, of York, who let out horses for hire, saying he had been sent by a Mr. Gibson Hartley to order a horse to be ready the next morning for the use of a son of Mr. Gibson Hartley. Mr. Hartley was a customer of Messrs. Thackray, and, therefore, when the prisoner called for the horse the next morning, it was delivered to him by the ostler. The prisoner drove the horse about during the day, and then returned it to Messrs. Thackray's stables, but he never paid the hire. It was held that, as he had no intention to deprive the owner of his property in the horse, but only intended to obtain the use of it for a limited time, he could not be convicted of obtaining the horse by false pretences.

* "The word 'obtain,'" said Bovill, C. J., "does not [* 92] mean obtain the *loan of*, but obtain the *property in*, any chattel."[1]

[Simpson for Crown.]

(*o*) 14 Cox, C. C. 108.
(*p*) 16 Cox, C. C. 62.

[1] As to the intent in the offence of false pretence to deprive the owner wholly of the property, the American decisions are not so clear. The offence is complete when the money or property is obtained: People *v.* Adams, 3

Obtaining railway ticket—The able counsel who appeared for the prosecution in this case pressed upon the intention of the Court the case of R. *v.* Boulton(*r*), where the prisoner had by false pretences obtained a railway ticket to travel by the Lancashire and Yorkshire line from Bradford to Huddersfield, and was held to have been rightly convicted, though the ticket had to be given up at the end of the journey. "The reasons for this decision," said the Court in the leading case, "do not very clearly appear, but it may be distinguished from the present case in this respect, that the prisoner by using the ticket for the purpose of traveling on the railway *entirely converted it to his own use for the only purpose for which it was capable of being applied.*"

Previous False Pretences.

[70.] **R. *v.* FRANCIS.**

[L. R. 2 C. C. R. 128 (1874.)]

The prisoner was indicted for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring. Evidence was held to have been rightly admitted to the effect that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other pawnbrokers advances upon a ring which he represented [* 93] to be a diamond * ring, but which, in the opinion of the witnesses, was nothing of the kind.

"It seems clear upon principle," said Lord Coleridge, C. J., "that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake." [1]

[Hensman for prisoner.]

(*r*) 1 Den. C. C. 508.

Demo, 190; Comm. *v.* Coe, 115 Mass. 481; and it is not necessary that actual loss has been sustained: People *v.* Pryor, 30 Ind. 350; People *v.* Herrick, 13 Wend. 87.

[1] Funk *v.* Ely, 45 Pa. 444—a case of forgery; Goersen *v.* Comm., 99 Id. 388; Weymen *v.* People, 4 Hun. 511, 518; Rankin *v.* Blackwell, 2 Johns. Cas. 198. Another leading English case is that of Blake *v.* Albion Life Assurance Society, L. R. 4 C. P. D. 94.

Previous misdeeds.—This case is useful as showing that there are times when the previous misdeeds of a prisoner may be given in evidence against him. See, also, R. *v.* Geering (*s*) as to poisonings; R. *v.* Richardson (*t*) as to embezzlements; R. *v.* Gray (*u*) as to arsons; and R. *v.* Whiley (*v*) as to utterings.

Subsequent obtainings.—But on a charge of obtaining money by false pretences from one person, evidence of a subsequent obtaining from another, is not admissible (*x*).

Restoration of Property on Conviction.

VILMONT *v.* BENTLEY. [71.]

[57 L. J. Q. B. 18 (1887).]

This was an interpleader issue, Bentley, the defendant, being a person who had in a *bonâ fide* manner, in the ordinary way of business, and in market overt, bought some goods which a man named Hodder had obtained by false pretences. Hodder was prosecuted to conviction, and, that being so, it was held that, in virtue of 24 & 25 *Vict. c. 96, s. 100, Bentley [*94] must restore the goods to the people who had been swindled out of them.[1]

[Charles, Q. C., and C. W. Mathews for plaintiff; Sir R. Webster, Q.C., A.-G., Jelf, Q. C., and Attenborough for defendant.]

Moyce v. *Newington overruled. Proceeds.*—The leading case overrules Moyce *v.* Newington (*y*), where it was held that section 100 only applied to cases in which possession had been obtained without the property passing.

See the recent case of R. *v.* JJ. of the Central Criminal Court (*yy*), as to the power of courts before which convictions take place to order the restitution of the proceeds of the goods as well as of the goods themselves.

(*s*) 18 L. J. (M. C.) 215.
(*t*) 2 F. & F. 343.
(*u*) 4 F. & F. 1102.
(*v*) 2 Leach, 983.
(*x*) R. *v.* Holt, 30 L. J. (M. C.) 11.
(*y*) 4 Q. B. D. 32.
(*yy*) 16 Cox, C. C. 143.

[1] Consult Rev. Stat. N. Y. Vol. 2 (4th Ed.) p. 930, Sections 37, 38, 39, 40, 41.

Rev. Stat. of Mass. p. 724, Section 25; Rev. Stat. of Me. p. 672, Section 14; Rev. Stat. of Mich. pp. 1665–6, Section 24; Hutchinson's Code of Miss. p. 938, Sections 18–19.

These are the most important statutes on the subject, but they may be found in all the states.

Forgery.

[72.] **R. *v.* ROBERT MARTIN.**

[5 Q. B. D. 34 (1879).]

The prisoner, admiring a pony and carriage which the prosecutor was driving at Ashford in Kent, agreed to buy them for £32, and both parties went into a neighbouring public-house to settle the matter. There the prisoner wrote out a cheque for the amount on a bank where he knew very well he had no account, and signed it "William Martin," whereas his real Christian name was "Robert," all this being with the intent to defraud. It was held, however, that he could not be convicted of forgery.[1]

[No counsel appeared.]

Dunn's case.—In this case the Court followed the resolution in Dunn's case (*z*), which is that, "In all forgeries the instrument supposed to be forged must be a false instrument in itself; and if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being wholly given to himself, without any regard to the name, or any relation to a third person."

See also the recent case or R. *v.* Harper (*zz*).

[* 95] * *Burglary.*

[73.] **R. *v.* HUGHES.**

[1 Leach, 406 (1785).]

The prisoner, with the intention of breaking into a house in the night-time to steal, bored a hole with an instrument called a "centre-bit" through the panel of the house-door near to one of the bolts by which it was fastened. Some of the pieces of the broken panel were found inside the threshold of the door, but it did not appear that any instrument, except the point of the centre-bit, or that any part of the prisoner's body, had been inside

(*z*) 1 Leach, 59.

(*zz*) 14 Cox, C. C. 574.

[1] Forgery may be committed by drawing in a fictitious name: Phillips *v.* State, 17 Ga. 459.

To sign the name of a non-resident person if likely to defraud, or with an assumed name if the paper purports to be genuine is forgery: U. S. *v.* Turner, 7 Peters, 132; U. S. *v.* Mitchel, Bald. 368; Comm. *v.* Smith, 6 S. & R. 569.

or that the aperture made was in fact large enough to admit a man's hand. It was held that there was here no sufficient *entry* to constitute burglary. [1]

[No counsel appeared.]

What is an "entry?"—Where no part of the prisoner's body entered the house, but he introduced an instrument, whether that introduction was such an entry as to make him guilty of burgarly depends on the object with which the instrument was employed. Thus, if the instrument was employed not merely for the purpose of making the entry but for the purpose of committing the contemplated felony, it will be held to have been an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand is not in, this is an entry (*a*).[2]

In R. *v.* Rust (*b*) where the prisoner threw up a window, and introduced a crow-bar to force the shutters, which were three inches from the window, but no part of his hand was within the window, this was held not to be an entry, although the jury found that the prisoner did it with the intent to steal.

Attempt.—Where the breaking with intent to commit a felony is proved, but there is no proof of entry, the prisoner may be convicted of the attempt to commit burglary (*c*).

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* *Arson.* [* 96]

R. *v.* CHILD. [74.]

[L. R. 1 C. C. R. 307. (1871).]

The prisoner, from ill-will and malice against the prosecutrix, broke up her chairs, tables, and other furniture, made a pile of them and her clothes on the stone floor of the kitchen of her lodgings, and lit them at the four corners, so as to make a bonfire of them. The building would almost certainly have been burned

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(*a*) 1 Hale, P. C. 555.
(*b*) 1 Mood, C. C. 183.
(*c*) R. *v.* Spanner, 12 Cox, C. C. 155.

[1] Breaking a shutter but not getting the hand through the pane of glass is not a sufficient entry: State *v.* McCall, 4 Ala. 643.

[2] A hand inserted to unlatch a window is a sufficient entry: Fisher *v.* State, 43 Ala. 717.

in consequence had not the police, who were sent for, succeeded in extinguishing the bonfire which the prisoner had kindled before the house was actually ignited. The prisoner was indicted under 24 & 25 Vict. c. 97, s. 7, which provides that "whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony." The verdict of the jury was "*guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious.*" On this finding, it was held that the prisoner was entitled to have his conviction quashed.

"It is a simple case," said Bovill, C. J., "of wilfully and maliciously setting fire to goods, and no more felony than setting fire to a box of matches on a stone floor." [1]

"I reserved the question for this Court," said Blackburn, J., "because I thought the framers of the section in question intended to include this case. But they have failed to express their intention."

[No counsel appeared.]

[* 97] In R. *v.* Nattass (*d*), where a servant girl under notice to leave *set various things on fire on three different occasions, and in R. *v.* Harris (*e*), where a workman, cut a valuable painting, known as "The Monarch of the Meadows," out of its frame, and then set fire to the frame in order to conceal his larceny,[2] the leading case was followed, and indeed, though some unfortunate miscarriages of justice have taken place in consequence, no other construction of section 7 seems possible.

(*d*) 15 Cox, C. C. 73.
(*e*) 15 Cox, C. C. 75,

[1] The putting fire to, or placing fire upon or against or in connection with anything, is equivalent to setting fire with intent to burn: State *v.* Dennin, 32 Vt. 158. Arson includes attempts to commit the crime, which are indictable at the common law: Young *v.* Comm., 12 Bush, 243; People *v.* Bush, 4 Hill, 133; State *v.* Johnson, 19 Iowa, 230.

[2] One is guilty of arson who wilfully and maliciously burns any house, edifice, structure, vessel or other erection capable of affording shelter for human beings, or appurtenant to or connected with any erection so adapted.

Malice and wilfulness are essential ingredients: Jesse *v.* State, 28 Miss. 100; Pairo *v.* State, 49 Ark. 27; or the intent may be to injure or defraud: State *v.* England, 78 N. C. 552.

A curious case arose where A. in maliciously attempting to burn B.'s house, set fire to C.'s, and it was decided to be a wilful and malicious burning of C.'s house: People *v.* Hennessy, 21 How. Prac. 238; Luke *v.* State, 49 Ala. 30.

Damage to Property.

R. *v.* WILLIAM FISHER. [75.]

[L. R. 1 C. C. R. 7 (1865).]

The prisoner plugged up the feed-pipe of a steam engine, and displaced other parts of the engine in such a way as rendered it temporarily useless, and would have caused an explosion if the obstruction had not been discovered and removed. It was held that he was guilty of damaging the engine with intent to render it useless, within the meaning of 24 & 25 Vict. c. 97, s. 15.

"It is like the case of spiking a gun," said Pollock, C. B., "where there is no actual damage done to the gun, although it is rendered useless. The case falls within the expression 'damage with intent to render useless.' Can it be said that the machine was not damaged when it was placed in such a position that, if the water had gone on boiling, the boiler would have burst? Moreover, great injury may be done to a machine by the displacement of its parts; and in this case, until the parts were replaced, the machine was useless. Surely the displacement of the *parts was [*98] a damage within the 15th section, if done with intent to render the machine useless."

[J. H. Mills for prisoner; Orridge for Crown.]

R. v. *Tacey.*—So under the repealed statute, 28 Geo. 3, c. 55, it was held that the taking out and carrying away of part of a stocking frame, without which the frame would not work, was *damaging* the frame, although the part taken out was not injured, and the replacing it would make the frame all right again (*f*).

Accomplices.

R. *v.* STUBBS. [76.]

[25 L. J. M. C. 16 (1855).]

Stubbs and three other persons were indicted at Durham County Quarter Sessions for stealing some copper. Three accomplices

(*f*) R. *v.* Tacey, R. & R. 452.

swore that Stubbs assisted at taking some of the copper and selling it to a marine-store dealer. The latter being called, stated that the three other prisoners were the parties who brought the copper and sold it to him. No other evidence was adduced against Stubbs, but the accomplices were corroborated in other particulars with regard to the three other prisoners. Stubbs was found guilty by the jury, and it was held that, although a conviction on the uncorroborated testimony of an accomplice is contrary to usage and to be regretted, still it is not contrary to the law, and cannot be quashed.

"We cannot interfere," said Jervis, C.J., "though we may regret the result that has been arrived at, for it is contrary to the ordinary practice. It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, and it [* 99] is the duty of the judge to tell the * jury that they *may* act on the unconfirmed testimony of an accomplice; but it is usual in practice to *advise* the jury *not* to convict on such testimony alone, and juries generally attend to the judge's direction, and require confirmation. But it is only a rule of practice."

[Gray for Crown.]

Necessity for corroboration.—The evidence of an accomplice, although admissible, is naturally regarded with very great suspicion.[1] Not only is the witness necessarily a person of damaged character—not only is he presumably anxious to save his own skin and please the authorities—but also he shows, by the very fact of his "rounding" on his friends, that he is destitute of the most elementary notions of loyalty and honour. The rule of practice, therefore, which requires that he shall be corroborated has become so well established that it is now almost, but not quite, a rule of law.

Both as to circumstances and identity.—The corroboration should be not only as to the circumstances of the crime itself, but also as to the prisoner's having been implicated in it (*g*).

Other accomplices.—The evidence of other accomplices is, of course, not corroboration (*h*); for no number of blacks will make a white. Nor will the

(*g*) See R. *v.* Birkett, 8 C. & P. 732.

(*h*) R. *v.* Noakes, 5 C. & P. 326.

[1] When the only proof against a person charged with a crime is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so: State *v.* People, 85 N. Y. 390; Watson *v.* Comm., 95 Pa. 418; State *v.* Litchfield, 58 Me. 267.

But the cases differ as to the nature and extent of the corroboration required: Hester *v.* Comm., 85 Pa. 139; Comm. *v.* Holmes, 127 Mass. 424; it is a rule of practice so to warn the jury, not a rule of law: Comm. *v.* Larrabee, 99 Mass. 413; and discretionary with the Court: Ingalls *v.* State, 48 Wis. 647.

evidence of the wife of an accomplice carry the case any further; for husband and wife must be taken as one for this purpose" (*i*).

Duty of judge.—It is to be observed, in conclusion, that the judge is not entitled to direct an acquittal as a matter of course in a case where there is no sufficient confirmation of an accomplice's evidence. He cannot do more than give the jury his *advice*, and tell them how important it is, for the protection of innocence, that no one should be convicted except on the testimony of at least one reliable witness.

Drunkenness as an Excuse for Crime.

R. *v.* CRUSE. [77.]

[8 C. & P. 541 (1838).]

A husband and wife were charged with seriously injuring a child with intent to murder it. It was held that * their having both been drunk at the time was a cir- [*100] cumstance which might be taken into account to show that they had no such guilty intention.

"It appears," said Patteson, J., to the jury, "that both these persons were drunk, and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention.[1] *A person may be so drunk as to be utterly unable to form any intention at all.*"

[Carrington for prisoners; J. Jeffreys Williams for Crown.]

R. v. *Monkhouse.*—In the later case of R. *v.* Monkhouse (*j*), where the prisoner was indicted for discharging a loaded pistol at the prosecutor with intent to murder him, Mr. Justice Coleridge expressed substantial agreement with the view of Mr. Justice Patteson in the leading case. "Drunkenness," he said, "is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself

(*i*) Per Park, J., in R. *v.* Neal, 7 C. & P. 168.

(*j*) 4 Cox, C. C. 55.

[1] Many European jurists view drunkenness more leniently as to crimes committed under its influence than the common law: American Jurist, Vol. 23, p. 290. Mr. Paley takes a like view: Paley on Moral and Political Philosophy, B. 4 C. 2.

The mere fact of drunkenness will not reduce to manslaughter a homicide otherwise murder: Penna. *v.* McFall, Addis. 255-257; People *v.* Fuller, 2 Park Crim. Rep. 16; State *v.* Haile, 11 Humph. 154. See also the learned note by Mr. Bishop in his work on Crim. Law, Vol. I.

from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist. To ascertain whether or not it did exist in this instance, you must take into consideration the quantity of spirit he had taken, as well as his previous conduct." [2]

R. v. Doherty.—So, in the very recent case of R. *v.* Doherty (*k*), which was a trial for murder, Mr. Justice Stephen said, "Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime."

Attempting suicide.—Drunkenness may be a complete defence to an indictment for attempting suicide (*l*).

Delirium tremens.—*Delirium tremens* caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person [* 101] incapable of distinguishing right from wrong, relieves him * from criminal responsibility for any act committed by him while under its influence (*m*).[3]

Insanity as an Excuse for Crime.

[78.] **R. *v.* OXFORD.**

[9 C. & P. 525 (1840).]

The prisoner discharged the contents of two pistols, probably not loaded with ball, at the Queen, and the defence of insanity was set up for him. It was held that he was not to be acquitted unless it was shown that he *did not know he was doing wrong.*

"The question is," said Lord Denman, C. J., "whether the prisoner was labouring under that species of insanity which satisfies you that he was quite *unaware of the nature, character, and consequences of the act* he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime."

[J. Sydney Taylor for prisoner; Campbell, A.-G., and Wilde, S.-G., for Crown.]

(*k*) 16 Cox, C. C. 306.
(*l*) See R. *v.* Moore, 3 C. & K. 319; and R. *v.* Doody, 6 Cox, C. C. 463.
(*m*) R. *v.* Davis, 14 Cox, C. C. 563.

[2] If one resolves to kill another, then drinks to intoxication intending to take life, it is murder in the first degree: Smith *v.* Comm., 1 Duvall, 224; State *v.* Gut, 13 Minn. 341.

[3] If the habit of drinking has created delirium tremens, it excuses any act committed unlawfully: Maconnehey *v.* State, 5 Ohio, 77; U. S. *v.* McGlue, 1 Curt. C. C. 1.

The Ferrers' case.—The point is, that everything depends on *the attitude of the prisoner's mind with regard to the particular act* charged against him.[1] If it was a guilty mind with regard to that act, its general derangement will not be an excuse. Thus in the case of Lord Ferrers (*n*), who was tried before the House of Lords for the murder of his steward, it was shown that he was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. But as it appeared that the murder *of his steward was deliberate, and that the earl knew quite well [*102] in that particular instance what he was doing, he was found guilty and executed. *The Townley case.*—So in the Townley case (*o*), the prisoner was no doubt the sort of person who ought to have been kept locked up all his life (*p*); but he was perfectly capable of appreciating the nature of his crime, and a more deliberate murder than that of Miss Goodwin was never committed.

Remarks of Stephen, J., in R. v. Davis.—"A person," said Stephen, J., summing up to the jury in R. *v.* Davis (*q*), a *delirium tremens* case on the North-Eastern Circuit, "may be *both insane and responsible* for his actions, and the great test laid down in McNaughten's case (*r*) was, *whether he did or did not know at the time that the act he was committing was wrong.* If he did, even though he were mad, he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action,—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason,—may be fairly said to prevent a man from knowing that what he did was wrong."

Sudden and uncontrollable impulse.—A mere uncontrollable impulse of the mind, co-existing with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity (*s*). For instance, if a barber is suddenly seized with an extraordinary impulse to cut the throat of the customer he is shaving, and does it without reason or motive, acting simply from the impulse, this is no ground for the defence of insanity.[2]

As to the defence of kleptomania, see Taylor's Medical Jurisprudence, vol. 2, p. 593.

(*n*) 19 St. Tri. 947. (*o*) R. *v.* Townley, 3 F. & F. 839.

(*p*) "His moral sense," said Dr. Forbes Winslow, in giving evidence, "was more vitiated than I ever found that of any other human being."

(*q*) 14 Cox, C. C. 563. (*r*) 10 Cl. & Fin. 200.

(*s*) R. *v.* Barton, 3 Cox, 275.

[1] If through an overwhelming violence of mental disease, the intellectual power of a person is for a time obliterated, he is not a responsible moral agent, and is not punishable for crime: Comm. *v.* Rogers, 7 Metc. 500; Thomas *v.* State, 40 Tex. 60.

[2] A crime committed under the impulse of passion, anger, and jealousy is not insanity: Guetig *v.* State, 66 Ind. 94. An irritable temper or an excitable disposition is no evidence of insanity: Willis *v.* People, 32 N. Y. 315; Freeman *v.* People, 4 Denio. 9.

Children as Criminals.

[79.] **R. *v.* OWEN.**

[4 C. & P. 236 (1830).]

A girl of ten was indicted for stealing coals. She had taken a few knobs of coal from a large heap, belonging to [* 103] * Messrs. Harford and Brothers, and put them in a basket she had with her. Of course she had no satisfactory explanation of her appropriation of the coals to offer. Notwithstanding that the facts were undisputed, the jury acquitted her, saying, "We do not think that the prisoner had any guilty knowledge."

"In this case," said Littledale, J., "there are two questions: *first*, did the prisoner take these coals? and *secondly*, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner, as we have heard, is only ten years of age; and unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. *Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong.*"[1]

[Lumley for Crown.]

Malitia supplet ætatem. Clark's case. Two distinct questions. Precociously bad little boy.—A child under seven cannot be guilty of a crime, for it is conclusively presumed to be *doli incapax*. Between seven and fourteen the presumption in favour of innocence still continues, but may be rebutted by strong and pregnant evidence of a mischievous discretion; for then *malitia supplet ætatem*. This *capacitas doli* ought to be affirmatively proved, as in the case of R. *v.* Clark (*t*), tried before Mr. Justice Denman at Winchester Assizes in 1880, where a little boy of eleven was charged with manslaughter, and his schoolmaster was put into the witness-box against him to show the

(*t*) Not reported, except in the Times.

[1] In the American law but few cases appear where infants under fourteen have been convicted of crime and capitally punished; in such cases the evidence of that malice which supplies age must be strong and clear beyond all doubt and contradiction: State *v.* Aaron, 1 South. 231; State *v.* Guild, 5 Halst. 163; State *v.* Bostick, 4 Har. (Del.) 563; Godfrey *v.* State, 31 Ala. 323; State *v.* Goin, 9 Humph. 175.

amount of his intelligence. If it were merely proved against a boy of ten or eleven that he killed a person intentionally, or picked his pocket, he would be entitled to his acquittal; but, of course, the surrounding circumstances may, in any particular case, furnish the proof of the "mischievous discretion" required. Thus, at Abingdon Assizes in 1629, before Mr. Justice Whitlock, a boy named Dean, about eight or nine years of age, was found guilty of * burning some barns at Windsor and sentenced to death, [* 104] *it appearing upon examination that he had malice, revenge, craft, and cunning* (*u*). *Capacitas doli shown by attempt at concealment.*—So, in a case where a boy of nine killed a playmate, *and then hid the blood and body*, the attempt at concealment was considered to prove the *capacitas doli* (*x*). The case of R. *v.* York (*y*), where a boy of ten murdered a little girl of five, is very similar.

Early depravity.—A boy under fourteen is conclusively presumed to be incapable of committing a rape; but he may be a principal in the second degree as aiding and assisting another, or he may be convicted of a common assault (*z*).

Coercion by Husband.

R. *v.* TORPEY. [80.]

[12 Cox, C. C. 45 (1871).]

The prisoner, a married woman, was indicted, together with her husband, who was not in custody, for a robbery with violence, in which she had herself taken a very active part, and the jury returned as their verdict that they were of opinion that the whole matter was pre-arranged by the husband, and that the wife acted under his coercion [1] and control at the time. This was held to amount to a verdict of not guilty.

[Montagu Williams and Horace Brown for prisoner; Metcalfe and Straight for Crown.]

Wife acting voluntarily.—The presumption that the wife was acting under her husband's coercion is one which can be rebutted by evidence, and, if it

(*u*) 1 Hale, P. C. 25, n.
(*x*) 1 Hale, P. C. 26.
(*y*) Fost. 70.
(*z*) R. *v.* Eldershaw, 3 C. & P. 396.

[1] At the common law, which still prevails, if the husband were present when the wife committed an offence, the law presumes, she acted under the coercion of her husband and he alone was punished: Comm. *v.* Neal, 10 Mass. 152; Uhl *v.* Comm., 6 Gratt, 706; State *v.* Banks, 48 Ind. 197.

is clear that she was acting freely and voluntarily in the matter, she ought to be convicted and punished just like a spinster (*a*).[2]

Strange case at Leeds Assizes.—In one of the earliest criminal cases in which the author was ever engaged (R. *v.* Wilson, tried at Leeds Summer [* 105] Assizes, 1877), * a husband and wife were jointly indicted for rape, the wife having gone so far as with her own hand to insert the organ of her husband into that of the prosecutrix. Mr. Vernon Blackburn and Mr. Charles Mellor, who defended the female prisoner, raised on her behalf the plea of coercion; but it was held by Mr. Justice Manisty, who tried the case, that there was ample evidence that the woman was acting freely and voluntarily, and not merely in obedience to her husband.

Further limitations on doctrine of coercion.—The presumption does not arise at all, unless the husband was present at the time of the commission of the offence (*b*), nor does it apply to crimes, which are *mala in se*,[3] and prohibited by the law of nature (*c*), nor to those relating to domestic matters and the government of the house (*d*).

Misdemeanours.—The point is not free from doubt, but there is some authority for saying that the presumption of coercion does not apply to misdemeanours at all (*e*).

Evidence of marriage.—Evidence of reputation and cohabitation is, in these cases, sufficient evidence of marriage (*f*).[4] It is a question for the jury, who need not attach any great importance to the female prisoner's having pleaded to an indictment describing her as a "single woman."

The leading case was followed in the more recent case of R. *v.* Dykes (*ff*).

Witnesses unable to Travel.

[81.] **R. *v.* WELLINGS.**

[3 Q. B. D. 426 (1878).]

In this case the principal witness for the prosecution was in hourly expectation of being confined, and the question was

(*a*) R. *v.* Cohen, 11 Cox, 99; and R. *v.* Hammond, 1 Leach, 447.
(*b*) R. *v.* Morris, R. & R. 270; but see R. *v.* Connolly, 2 Lewin, 229.
(*c*) R. *v.* Manning, 2 C. & K. 903.
(*d*) R. *v.* Dixon, 10 Mod. 336.
(*e*) See R. *v.* Ingram, 1 Salk. 384; R. *v.* Cruse, 8 C. & P. 545; and R. *v.* Price, 8 C. & P. 19.
(*f*) See R. *v.* Woodward, 8 C. & P. 561. (*ff*) 15 Cox, C. C. 771.

[2] But the presumption of coercion is not conclusive, it may be rebutted by evidence: Comm. *v.* Murphy, 2 Gray, 513; Wagener *v.* Bell, 19 Barb. 321; Edwards *v.* State, 27 Ark. 493; Tabler *v.* State, 34 Ohio, 127; State *v.* Parkerson, 1 Strob. 169.

[3] Coercion has no application to capital offences, even if she act in the presence of her husband: Comm. *v.* Neal, 10 Mass. 152; Davis *v.* State, 15 Ohio, 72.

[4] Evidence of reputation and cohabitation is sufficient proof of marriage: see Rose. Crim. Evid. 986, and cases there collected.

whether her deposition could be read at the trial on the ground that she was so ill as to be unable to travel. It was clear from the evidence of her husband that she was very ill, and under the particular * circumstances of the case it was held [* 106] that her deposition was rightly received in evidence.[1]

"Pregnancy," said Lord Coleridge, C. J., "may be a source of such illness as to render the witness unable to travel, and be an illness within the statute. *It is in each case a matter for the presiding judge to determine.*"

[Selfe for prisoner; Godson for Crown.]

Presumption can be rebutted.—This decision is manifestly consistent with reason and common sense. No doubt, as Willes, J., is reported to have said in R. *v.* Walker (*g*), "illness from confinement is an ordinary state, and not such an illness as is contemplated by the statute;" but that is only the presumption, and if it can be shown that, as a matter of fact, the woman is "so ill as not to be able to travel," and that the other conditions of 11 & 12 Vict. c. 42, s. 17, have been complied with, her deposition ought to be received.

The leading case was followed in the later case of R. *v.* Goodfellow (*gg*).

Confessions under Inducements.

R. *v.* FENNELL. [82.]

[7 Q. B. D. 147 (1881).]

The prisoner was accused of larceny as a servant. Previously to being charged, he had been taken into a room with the prosecutor and a police inspector. The prosecutor than said, "*The inspector tells me you are making housebreaking implements; if that is so, you had better tell the truth; it may be better for you.*" It was held that the admissions subsequently made could not be received in evidence.[2]

[Mews for prisoner; Prankerd for Crown.]

(*g*) 1 F. & F. 534. (*gg*) 14 Cox, C. C. 326.

[1] Statutes providing for the taking of depositions are also found in the several states. In general features they resemble the English statutes: U. S. Rev. Stat. Sec. 863—875; N. Y. Code Civil Pro. sections 887—920; 1 Green Evid. Sections 320—325.

[2] The English decisions seem to regard language amounting to an inducement to make a confession with less favour than formerly, and the American cases, on this point of evidence, have assumed the same tendency: People *v.* Phillips, 42 N. Y. 200; Comm. *v.* Curtis, 97 Mass. 574; Fife *v.* Comm., 29 Pa. 429; Flagg *v.* People, 40 Mich. 706.

Confessions must be free.—For a confession to be admissible evidence against a prisoner, it must have been made *freely and voluntarily.* If it was [*107] made in * consequence of any *inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority*, it cannot be used.

Religious and moral exhortations. Wild's case.—Inducements in the nature merely of religious or moral exhortations do not render confessions inadmissible. "*Now kneel down,*" said a man once to a boy, just apprehended on a charge of murder, "*I am going to ask you a very serious question and I hope you will tell me the truth in the presence of the Almighty.*" It was held that the lad's subsequent confession could be given in evidence against him, *no inducement of a temporal nature referring to the charge* against him having been held out to him (*h*).[2]

Person in authority.—It is to be observed also that an inducement held out by a person not in authority does not exclude a confession. Prosecutors, constables, searchers, gaol surgeons, &c., are persons in authority (*j*). The prisoner's master is a person in authority only if it is against him that the crime has been committed (*k*).[3]

Inducement not influencing.—Notwithstanding that a threat or promise may have been made use of, a confession is to be received if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence, on the prisoner's mind (*l*).

Thinking accomplices in custody.—It is no objection to the admissibility of a confession that it was made under a mistaken supposition that some of the prisoner's accomplices were in custody, even though such a supposition was created by artifice, with a view to the obtaining of the confession (*m*).

Questioning prisoners.—Police constables have no business to ask prisoners in their custody questions relating to the offences they are charged with; and, indeed, it is doubtful whether a confession made under such circumstances would be admissible in evidence (*n*).

Confession by drunken prisoner.—A statement made by a prisoner when he is drunk is admissible, even though he was cunningly plied with liquor in the hope of his making admissions (*o*).[4]

(*h*) R. *v.* Wild, 1 Moo. C. C. 452; and see R. *v.* Gilham, R. & M. C. C. 186.
(*j*) See R. *v.* Moore, 2 Dears. C. C. 526; and R. *v.* Kingston, 4 C. & P. 387.
(*k*) R. *v.* Moore, *supra.*
(*l*) See R. *v.* Clewes, 4 C. & P. 224; R. *v.* Richards, 5 C. & P. 318; and R. *v.* Howes, 6 C. & P. 404.
(*m*) R. *v.* Bailey, 1 Phil. Ev. 104.
(*n*) See R. *v.* Gavin, 15 Cox, C. C. 656; but also see R. *v.* Thornton, 1 Moo. C. C. 27; and R. *v.* Kerr, 8 C. & P. 176.
(*o*) R. *v.* Spilsbury, 7 C. & P. 187.

[2] People *v.* Cox, 80 N. Y. 501; State *v.* Wentworth, 37 N. H. 196; State *v.* Tates, 50 Vt. 483.

[3] Smith *v.* Comm., 10 Gratt. 734; Shiffet *v.* Comm., 14 Id. 652; Young *v.* Comm., 8 Bush (Ken.), 366; U. S. *v.* Stone, 8 Fed. Rep. 232.

[4] Comm. *v.* Howe, 9 Gray, 110; Jefferds *v.* People, 5 Park. Crim. 522; State *v.* Greer, 28 Minn. 426; People *v.* Remirez, 56 Cal. 533; State *v.* Feltes, 51 Iowa, 495; Eskridge *v.* State, 25 Ala. 39.

Words spoken in sleep are not admissible as a confession: People *v.* Robinson, 19 Cal. 41.

* *Dying Declarations.* [* 108]

R. *v.* JENKINS. [83.]

[L. R. 1 C. C. R. 187 (1869).]

One October night, about twenty years ago, a woman was found almost drowned in a very deep part of the river Avon. She was rescued from the water in an exhausted condition, and in very great danger of her life. The next day she said she did not think she should get over it, and asked that some one should be sent for to pray with her. Later in the day the magistrate's clerk came, and found her very ill indeed. He administered an oath, and received from her a written statement to the effect that she had gone for a walk with the prisoner, and he had pushed her into the river. At about 11 o'clock on the morning of the next day after making this statement the woman died, and the question was, whether her statement could be received in evidence. At the time she made it she was no doubt in imminent danger, and in the statement she said, "From the shortness of my breath I feel that I am likely to die, and I have made the above statement with the fear of death before me, *and with no hope at present of my recovery.*" The words "*at present*" had been inserted at the woman's own suggestion, and were not in the first draft. It was held that the statement could not be received in evidence, because at the time she made it there was evidently a faint hope of recovery still lingering in the woman's mind.[1]

"The result of the decisions," said Kelly, C.B., "is that there must be an unqualified belief in the nearness of death—a belief, without hope, that the declarant is about to die. If we look at reported cases, and at the language of * learned [* 109] judges, we find that one has used the expression, 'every hope of this world gone' (*p*); another, 'settled hopeless expectation of death' (*q*); another, 'any hope of recovery, however slight, renders the evidence of such declarations inadmissible' (*r*). We,

(*p*) Per Eyre, C.B., Woodcock's case, 1 Leach, C. C. 502.
(*q*) Per Willes, J., R. *v.* Peel, 2 F. & F. 22.
(*r*) Per Tindal, C.J., R. *v.* Hayward, 6 C. & P. 160.

[1] Dying declarations to be admissible must be made under the sense of impending death: 1 Green. Evid. Sec. 158; People *v.* Simpson, 48 Mich.; Small *v.* Comm. 91 Pa. 304. Even a faint hope of recovery excludes the declarations: People *v.* Gray, 61 Cal. 164; Comm. *v.* Roberts, 108 Mass. 296.

as judges, must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution."

"Dying declarations," said Byles, J., "ought to be admitted with scrupulous, and I had almost said with superstitious, care."

[Collins and Norris for prisoner; T. W. Saunders and Bailey for Crown.]

Taking more cheerful view.—But in R. *v.* Hubbard (*s*) it was held by Mr. Justice Hawkins, at Ipswich Assizes, that a declaration made under a belief of impending death was admissible in evidence, even though the declarant at a later period of the day took a more cheerful view of her position, and thought she should recover.

Five conditions.—In order to render dying declarations admissible in evidence, five conditions must be complied with, viz.:—

(1) The prisoner against whom the declaration is proposed to be given must be on his trial for the *murder or manslaughter* of the declarant (*t*).

(2) The declaration must have been made by a person who, if alive, would have been a *competent witness* against the prisoner (*u*).[2]

(3) At the time he made the declaration, the declarant must have been in *actual danger* of death.

(4) At the time he made the declaration, the declarant *must have given up all hope* of recovery (*x*).

(5) The declaration must have *reference to the circumstances* of the transaction which resulted in the declarant's death.

[* 110] **Exclamations as part of Res Gestæ.*

[84.] **R. *v.* BEDINGFIELD.**

[14 Cox, C. C. 341 (1879).]

On an indictment for murder, it appearing that the deceased, with her throat cut, came suddenly out of a room in which she

(*s*) 14 Cox, C. C. 565.

(*t*) R. *v.* Lloyd, 4 C. & P. 233; and R. *v.* Mead, 2 B. & C. 605.

(*u*) R. *v.* Pike, 3 C. & P. 598; and see R. *v.* Perkins, 2 Moo. C. C. 135.

(*x*) An obviously mortal wound is not enough in itself. In R. *v.* Cleary, 2 F. & F. 850, Erle, C. J., said that he could not, in the absence of evidence, presume that a man who had been shot through the body must necessarily feel that he was about to die. See also R. *v.* Smith, 16 Cox, C. C. 170.

[2] The sense of impending death is deemed equivalent to the sanction of an oath. Hence dying declarations made by persons disqualified to act as witnesses in court are not competent, *e. g.*, atheists: Donnelly *v.* State, 26 N. J. Law, 465.

left the prisoner, who also had his throat cut, and was speechless, and that she said something immediately after coming out of the room and a few minutes before she died, the question being one of murder or suicide, it was held that her statement was not admissible either as a dying declaration or as part of the *res gestæ*.[1]

"It was not," said Cockburn, C. J., "as if, while being in the room, and while the act was being done, she had said something which was heard."

[Simms Reeve for prisoner; Carlos Cooper and Blofield for Crown.]

General rule as to declarations at time of assault.—The general rule is, that the declarations of a person robbed, ravished, or murdered, made *immediately after* the assault, are good evidence, and there is considerable doubt whether the ruling of Cockburn, C. J., in the leading case was correct (*y*).[2]

Followed in R. v. *Goddard.*—It appears, however (see page 23 of his pamphlet), to have been given after consultation with Field and Manisty, JJ., who agreed with him, and it was followed by Hawkins, J., in R. *v.* Goddard (*z*)

R. v. *Foster.*—In R. *v.* Foster (*a*), where the prisoner was on his trial for manslaughter by driving a cabriolet over a man named Ferrall, it was proposed to give in evidence against him a statement made by the deceased, immediately after he was knocked down, as to how the accident happened. Mr. C. Phillips, for the prisoner, objected that "what the deceased said in the absence of the prisoner as to what had caused the accident, was not receivable in evidence." Baron Gurney, however, replied, "What the deceased said at the * instant as to the cause of the accident is [* 111] clearly admissible," and, the rest of the Court (Park, J., and Patteson, J.) concurring, the evidence was received.

Uncertainty of the law.—Thompson *v.* Trevanion (*b*) is to the same effect, but of both these cases it is said in Roscoe's Criminal Evidence (10th ed. p.

(*y*) The Chief Justice got into a public controversy with Mr. Pitt-Taylor about this case, and elaborately defended his ruling in a pamphlet.

(*z*) 15 Cox, 7.

(*a*) 6 C. & P. 325.

(*b*) Skin. 402.

[1] A declaration made by the declarant as to the cause of his death or as to any of the circumstances of the transaction resulting in death is relevant; the constitutional provision that the accused shall be confronted with the witnesses against him does not exclude evidence of dying declarations: Brown *v.* Comm., 73 Pa. 321–328; State *v.* Dickinson, 41 Wis. 288; Comm. *v.* Carey, 12 Cush. 246; Robbins *v.* State, 8 Ohio, 131.

[2] The propriety of this decision was the subject of two pamphlets: one by Judge W. Pitt-Taylor who denied it, the other by the Lord Chief Justice who maintained it. The view taken by the former is upheld in the law of this country: Comm. *v.* Hackett, 2 Allen, 136; Comm. *v.* McPike, 3 Cush. 181; People *v.* Simpson, 48 Mich. 474. For a valuable discussion of Bedinfield's case see 14 Amer. Law Review, 817; 15 Id. 1, 71, 189.

28) that they are "difficult to reconcile with established principles," and that "it seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under circumstance which entitle them to be considered as dying declarations, are receivable in evidence."

Notice to Produce.

[85.] R. *v.* ELWORTHY.

[L. R. 1 C. C. R. 103 (1867).]

The prisoner, a solicitor, was indicted for perjury for having falsely sworn that there was no draft of a certain statutory declaration made by a client. No notice to produce the draft had been given to the prisoner, and upon his trial it was proved to have been last seen in his possession. It was held that, in the absence of such notice, secondary evidence of its contents was inadmissible.

"It is very important," said Kelly, C. B., "to conform to the rules of law which protect the accused from the admission of evidence of a doubtful and uncertain character when certain evidence can be obtained."

[Carter for prisoner; Besley for Crown.]

Document in hands of other side.—The general rule, both in civil and criminal cases, is, that where a written instrument, of which it is desired to make use at the trial, is in the hands of the opposite party, it is necessary to serve him, or his solicitor, with a notice to produce it. If, after [*112] that has *been done, it is not produced at the trial, then, upon proving the service of the notice, secondary evidence may be given.[1]

[1] Secondary evidence of the contents of a document may not be given unless the party proposing to give such secondary evidence has, if the original is in the possession or under the control of the adverse party, given him notice to produce it as the Court regards as reasonably sufficient to enable it to be procured: Foster *v.* Newborough, 58 N. Y. 81; Draper *v.* Hatfield, 124 Mass. 53; Elbert *v.* Finkheimer, 68 Pa. 243. Notice is not required, unless the original is in the party's possession or control: Roberts *v.* Spencer, 123 Mass, 397; the notice may be given to the party's attorney: Brown *v.* Littlefield, 7 Wend. 454; Den *v.* McAllister, 7 N. J. Law 46; notice must be given a sufficient time beforehand: McPherson *v.* Rathbone, 7 Wend. 216; Bourne *v.* Buffington, 125 Mass. 481; and must definitely describe the document required: Walden *v.* Davison, 11 Wend. 65.

Notice sometimes unnecessary.—But a notice to produce is not required where, from the nature of the case, the prisoner must be aware that he is charged with the possession of the document in question. Thus, upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given without any proof of a notice to produce (*c*); and so, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant in fact said was held to be sufficient without giving him notice to produce the paper (*d*).

Kind of notice required. R. v. *Kitson.*—Notice to produce need not be given in writing (*e*), though, of course, it had better be. It must be served within a reasonable time; but what is a reasonable time must depend on the circumstances of each case (*f*). In R. *v.* Kitson (*g*) the prisoner was indicted at Cambridge Assizes for arson in setting fire to his own house with intent to defraud an insurance office. Notice to produce the policy was given him about the middle of the day preceding the trial. The prisoner's residence, where the fire happened, was thirty miles from Cambridge. It was held that proper notice to produce had not been given, and that secondary evidence of the policy was not admissible. *R.* v. *Barker.*—But in R. *v.* Barker (*h*), a notice to produce policies of insurance, served on the prisoner's attorney on a Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies if the prisoner had chosen to do so. "No general rule," said Bramwell, B., "can be laid down. Every case must be governed by particular circumstances, and as in this case there had been an opportunity of obtaining the policies, the notice is sufficient."

No degrees of secondary evidence.—There are no degrees of secondary evidence. Therefore, if secondary evidence can be given at all, a party may give parol evidence of the contents of a letter of which he has kept a copy, and is not bound to produce the copy (*i*).[2]

(*c*) R. *v.* Aickles, 1 Leach, 294.
(*d*) R. *v.* Moon, 6 East, 419, n.
(*e*) Smith *v.* Young, 1 Camp. 440.
(*f*) R. *v.* Ellicombe, 5 C. & P. 522.
(*g*) Dears. 187.
(*h*) 1 F. & F. 326.
(*i*) Brown *v.* Woodman, 6 C. & P. 206.

[2] It is the English doctrine that there are no degrees in secondary evidence, and a party may introduce any form thereof. Some American States adopt the same rule: Goodrich *v.* Weston, 102 Mass. 362; Carpenter *v.* Dane, 10 Ind. 125; Eslow *v.* Mitchel, 26 Mich. 500.

But generally in this country, a party must produce the best form of secondary evidence that is or appears to be procurable by him: Cornett *v.* Williams, 20 Wall. 226; Reddington *v.* Gilman, 1 Bos. 235; Niskayuna *v.* Albany, 2 Cow. 537; Stevenson *v.* Hoy, 43 Pa. 191; Land Co. *v.* Bonner, 75 Ill. 315; Harvey *v.* Thorpe, 28 Ala. 250; Higgins *v.* Reed, 8 Iowa, 298; Nason *v.* Jordon, 62 Me. 480; see Van Dyke *v.* Thayne, 19 Wend. 166.

[* 113] * *Character of Witnesses.*

[86.] **R. *v.* BROWN AND HEDLEY.**

[L. R. 1 C. C. R. 70 (1867).]

The prisoners was tried for conspiring to assault a man named Robinson, and it was proposed to call witnesses on their behalf to say that the general reputation of the witnesses for the prosecution was so bad that they could not be believed, even on their oaths. It was held that this was perfectly good evidence, and should have been received.

[Shepherd for prisoners; A. W. Simpson for Crown.]

R. v. *Rowton.*—The counsel for the Crown in this case seems to have relied principally on R. *v.* Rowton (*k*), where a prisoner who was accused of indecently assaulting a boy called witnesses to character, and it was held that evidence of bad character, but not of bad disposition, could be given in reply. The two decisions, however, are not inconsistent.

Proper way of putting question.—The proper question to ask of a witness called as in the leading case is, "From your knowledge of his general character, would you believe him on his oath?" (*l*)[1]

Effect of Misreception of Evidence.

[87.] **R. *v.* GIBSON.**

[18 Q. B. D. 537 (1887).]

The prisoner was found guilty of unlawful wounding by throwing a stone at the prosecutor. In giving his evidence the prosecutor said, but not in answer to any specific question put [* 114] to him, "*Immediately after I was * struck by the said stone, a lady going past, pointing to the prisoner's door,*

(*k*) L. & C. 520.

(*l*) See Taylor on Evidence, 8th ed. p. 1257.

[1] It is a well settled rule in this country that a witness of the adverse party may be impeached by evidence from other persons of his general bad reputation in his own community. The impeaching witness must come from this community and in examining anyone of them the form of inquiry usually is to ask (1) whether he knows the general reputation in that community of the witness in question; then if he assents, (2) what that reputation is, and (3) whether on such knowledge, he would believe such witness on his oath: 1 Green. Evid. Sec. 460. In Massachusetts it is discretionary whether the first question shall be asked: Wetherbee *v.* Norris, 103 Mass. 565.

said, 'The person who threw the stone went in there.' "[1] It was admitted that the prisoner could not have heard this, and yet it was allowed to go to the jury as part of the evidence for the prosecution. It was held that the conviction was bad, notwithstanding that there was other evidence before the jury properly admitted and sufficient to warrant a conviction.

"I am of opinion," said Lord Coleridge, C. J., "that the true principle which governs the present case is that it is the duty of the judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows."

"If a mistake had been made by counsel," said Wills, J., "that would not relieve the judge from the duty to see that proper evidence only was before the jury. It is sometimes said—erroneously, as I think—that the judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence."

[Shand for Crown.]

Importance of leading case—The decision in this case is obviously of great importance, and ought to lead to the upsetting of a good many convictions which have been secured before county magistrates at Quarter Sessions.

Attempt to Incite.

R. *v.* RANSFORD. [88.]

[13 Cox, C. C. 9 (1874).]

The prisoner wrote an immoral letter to a boy at Christ's Hospital with the object of inciting him to commit an * unnatural offence. The letter, however, did not reach [*115] the boy, as it was intercepted by the school authorities and the police. It was held that the *sending the letter* proved the *attempt to incite;* although it might be doubtful whether it could be said to amount to inciting or soliciting[2] inasmuch as the boy was not aware of its contents.

[Straight and Gill for Crown.]

[1] See Stephens *v.* Vroman, 16 N. Y. 381 (1857); People *v.* Beach, 87 Id. 508 (1882); Comm. *v.* Ricker, 131 Mass. 581 (1881); Comm. *v.* Felch, 132 Mass. 221 (1882).

[2] Soliciting to commit a felony without any other act being done is suffi-

Misdemeanour—Any attempt to commit a misdemeanour is itself a misdemeanour (*m*). And the soliciting and inciting a person to commit a *felony*, where no felony is in fact committed by the person so solicited, still remains a *misdemeanour* only, notwithstanding 24 & 25 Vict. c. 94, s. 2 (*n*).

As to attempt, see also R. *v.* Collins, p. 74.

Arrest.

[89]. **R. *v.* CUMPTON.**

[5 Q. B. D. 341 (1880).]

The prisoner was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty. The constables were apprehending the prisoner within the city of Worcester under a warrant, issued by two county juctices, for his commitment to prison for default in payment of a fine, but the warrant was *not backed by any city justice.* It was held that the conviction was wrong, the constables not having been acting "in the execution of their duty."[1]

[J. J. Powell, Q. C., and Patrick Evans for prisoner; H. Matthews, Q. C., and R. H. Amphlett for Crown.]

Codd v. *Cabe. R.* v. *Chapman.*—The liberty of the subject is so jealously guarded by our laws that all prescribed formalities must be carefully [* 116] complied with * before an arrest can be recognized as legal. Thus,

(*m*) R. *v.* Philipps, 6 East, 464.
(*n*) R. *v.* Gregory, L. R. 1 C. C. R. 77.

cient to warrant a conviction: People *v.* Bush, 4 Hill, 133. See Comm. *v.* Glover, 111 Mass. 395; Oliver *v.* Comm., 77 Va. 590. Indictments will not lie for solicitations merely: Smith *v.* People, Comm. 54 Pa. 209; Stoebler *v.* Comm., 95 Id. 318; Kelly *v.* Comm., 1 Grant, 484; Cox *v.* People, 82 Ill. 191. See a learned opinion in State *v.* Hayes, 78 Mo. 307; relying on Comm. *v.* Jacobs, 9 Allen, 274. An accessory before the fact is one who though absent at the commission of a crime, yet procures, counsels, encourages, incites, or commands another to commit a crime; but he must have the same intent as the principal: People *v.* Hodges, 27 Cal. 340; People *v.* McMurray, 4 Park. Crim. Rep. 234; Comm. *v.* Hurley, 99 Mass. 433; U. S. *v.* Lyles, 4 Cranch, C. C. 469.

[1] Resistance and striking a constable there being no writ or process in his hands, is not resistance in the execution of legal process: Jones *v.* State, 60 Ala. 99.

in Codd *v.* Cabe (*o*) it was held, following Galliard *v.* Laxton (*p*) and R. *v.* Chapman (*q*), that when a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest, otherwise there cannot be a conviction for assaulting the police officer in the execution of his duty. "I have always held it to be a clear law," said Baron Bramwell, "that a person not charged with a felony shall have the opportunity of seeing the warrant when he is taken into custody."[2] So, in R. *v.* Chapman (*q*), above referred to, it was held not to be murder, but only manslaughter, where the arrest of a poacher was attempted by an officer who had seen the warrant, but had not got it with him at the time, and the poacher killed the officer. But "cases may be imagined where the absence of a warrant might be no defence as where the murder was premeditated" (*r*).

See also Wigram's Justices' Note Book, 5th ed., p. 82.

Admiralty Jurisdiction.

R. *v.* KEYN. [90.]

[2 Ex. D. 63 (1876).]

This was the famous case of the "Franconia," a German ship which ran down a British ship, the "Strathclyde," a couple of miles off Dover, and drowned a passenger named Jessie Young. The prisoner, a German, was in command of the "Franconia," and the question was whether the Central Criminal Court had jurisdiction to try him for manslaughter. This question, after most elaborate discussion, was decided in the negative, on the ground that prior to 28 Hen. 8, c. 15, the Admiral had no jurisdiction to try offences committed by foreigners on board foreign ships, whether within or without the limit of three * miles [* 117] from the shore of England, and that that and the subsequent statutes only transferred to the common law courts and

(*o*) 1 Ex. Div. 352.
(*p*) 2 B. & S. 363.
(*q*) 12 Cox, C. C. 4.
(*r*) Per Lindley, J., in R. *v.* Carey, 14 Cox, C. C. 214.

[2] An officer, according to our decisions, is not bound to exhibit his warrant and read it before securing his prisoner if he resists: Comm. *v.* Cooley, 6 Gray, 350; Johnson *v.* State, 30 Ga. 426. An officer may call on persons to aid him in the execution of his duties and a refusal to aid the officer in such an event is an offence: Resp. *v.* Montgomery, 1 Yeates, 419; Comfort *v.* Comm., 5 Whart. 437.

the Central Criminal Court the jurisdiction formerly possessed by the Admiral.[1]

[Benjamin, Q.C., Cohen, Q.C., Phillimore, and Stubbs for prisoner; Sir H. Giffard, S.-G., Poland, C. Bowen, and Straight for Crown.]

Alteration of law.—The judgment in this case led to the passing of 41 & 42 Vict. c. 73, the Territorial Waters Jurisdiction Act, 1878, the second section of which statute enacts that "an offence committed by a person, whether he is or is not a subject of her Majesty, on the open sea within the territorial waters of her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board, or by means of, a foreign ship; and the person who committed such offence may be arrested, tried, and punished accordingly."

British ships in foreign rivers.—The jurisdiction of the Admiralty in the case of British ships, and all persons on board them, extends not only over the high seas, but also in foreign rivers "as far as great ships go"; although the municipal authorities of the foreign country may have concurrent jurisdiction (*s*).

Anderson's case.—An American citizen, serving on board a British ship caused the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the river of Garonne, within French territory, at a place below bridges, where the tide ebbed and flowed and great ships went. It was held that the ship was within the admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Old Bailey (*t*). "There is no doubt," said Bovill, C. J., "that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and as such he must be taken to have been under the protection of the British law, and also amenable to its provisions.

(*s*) R. *v.* Anderson, L. R. 1 C. C. R. 161; and see R. *v.* Jernot, 1 Russ. C. p. 153; and R. *v.* Allen, 1 Mood. C. C. 494.

(*t*) R. *v.* Anderson, L. R. 1 C. C. R. 161.

[1] From the cases, it appears, that though the general cognizance of all cases of admiralty and maritime jurisdiction, as given by the Constitution, extends equally to the criminal and civil jurisdiction of the admiralty, as known in the English and maritime law when the Constitution was adopted; yet without a particular provision in the case, the federal courts do not exercise criminal jurisdiction as courts of admiralty over maritime offences. It seems now to be settled that the federal courts as courts of admiralty are to exercise such criminal jurisdiction as is conferred upon them expressly by acts of Congress. The United States Courts have no unwritten criminal code to which resort can be had as a source of jurisdiction.

They have none but what is conferred by Congress, and this principal extends as well to admiralty and maritime as to common law offences: U. S. *v.* Hudson, 7 Cranch. 32; U. S. *v.* Coolidge, 1 Wheat. 415; U. S. *v.* Bevins, 3 Id. 336; U. S. *v.* Wiltberger, 5 Id. 76.

It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship, and was at the time a portion of its crew." "The ship," said Byles, J., "being a British ship * was, under the circumstances, a floating island, where the British [*118] law prevailed . . . . The only consequence of the ship being within the ambit of French territory is, that (the vessel not being an armed vessel) there might have been concurrent jurisdiction, had the French law claimed it."

Carr's case.—The later case of R. *v.* Carr (*u*) is to the same effect. Some bonds were stolen from a British ocean-going merchant ship whilst she was lying afloat in the ordinary course of her trading in the river at Rotterdam, in Holland, moored to the quay, and were afterwards wrongfully received in England by the prisoners with a knowledge that they had been thus stolen. The place where the ship lay at the time of the theft was in the open river, sixteen or eighteen miles from the sea, but within the ebb and flow of the tide. There were no bridges between the ship and the sea, and the place where she lay was one where large vessels usually lay. It did not appear who the thief was, or under what circumstances he was on board the ship. It was held that the prisoners could be properly tried at the Old Bailey, the larceny having taken place within the jurisdiction of the Admiralty. "The whole question is," said Stephen, J., "was the theft within the jurisdiction of the Admiralty of England? Ever since the time of Richard II. its jurisdiction has extended to *where great ships go* . . . . . I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction, and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment to land, or to inquire when the flag is lowered or when hoisted. Such rules would be to make law without meaning, and to narrow well-founded and beneficial jurisdiction. I prefer the obvious and wholesome principle that jurisdiction and protection in these cases are co-extensive."

Limitations on Admiralty jurisdiction.—The Admiralty jurisdiction, however, does not extend to any cinque port, haven, or pier; or to any creek, river, or port *within the body of a country*, that is to say, so far land-locked as that a man standing on either side can perceive what is doing on the other.

British murderers abroad.—It may be mentioned here that British subjects who commit murders or manslaughters *on land* in foreign countries are triable in this country by virtue of 24 & 25 Vict. c. 100, s. 9.

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* *Trial of Peers of the Realm.* [*119]

R. *v.* LORD AUDLEY. [91.]

[3 Cobbett's State Trials, 402 (1631).]

In this extraordinary case two points of considerable import-

(*u*) 10 Q. B. D. 76.

ance were settled: (1) that a peer of the realm may not waive his trial by peers, and (2) that a husband may be found guilty of a rape on his own wife if he was giving assistance to the person actually committing the crime.

[Sir Robert Heath, A.-G., Sir Richrad Shelton, S.-G., Sir John Finch, Queen's A.-G., and Sir Thomas Crew, King's Sergeant-at-Law, for Crown.

Misdemeanour. Plea in abatement. Finding by grand jury. Nobility of blood.—It is only in cases of treason and felony that a peer is entitled to be tried by his brother peers. For a misdemeanour he is tried just like a commoner. "If a peer of Parliament, indicted for felony, is arraigned elsewhere than before the House of Lords, or in the Court of the Lord High Stewart he may plead his peerage in abatement" (*x*) When a charge of treason or felony is made against a peer, the indictment is found in the ordinary way by a grand jury, and removed thence by *certiorari*. The privilege of being tried before the House of Lords, or in the Court of the Lord High Stewart, depends not on the right to sit and vote in the House of Lords, but on nobility of blood. Therefore, a peer who is a minor, a peerless, or Scotch or Irish non-representative peer, can claim such a trial, while a bishop cannot (*y*)

Autrefois Acquit.

[92.] **R. *v.* O'BRIEN.**

[15 Cox, C. C. 29 (1882).]

A couple of Irishmen were tried at the Worcestershire Quarter Sessions on an indictment charging them with lar-
[* 120] *ceny at common law, and, in a second count, with receiving "the goods aforesaid." They were acquitted, on the ground that the alleged goods were a fixture in a building. They were then charged upon a second indictment, under 24 & 25 Vict. c. 96, s. 31, for stealing the fixture, and to that they set up the plea of *autrefois acquit*. It was held that such a defence would not avail them, because they were never in jeopardy in respect of the count for receiving in the first indictment.[1]

[F. Forester Goold for prisoners; J. D. Sims for Crown.]

(*x*) Stephen's Dig. Crim. Proc. p. 172.
(*y*) See Shirley's Sketch of the Criminal Law, p. 81.
[1] People *v.* McGowen, 17 Wend. 386; Slaughter *v.* State, 6 Humph. 410; State *v.* Mahen, 35 Me. 225; Comm. *v.* Roby, 12 Pick. 496; Comm. *v.* Andrews, 2 Mass. 409; State *v.* Shepherd, 7 Conn. 56.

R. v. *Gilmore.*—So it was held in R. *v.* Gilmore (*z*) that an acquittal upon an indictment under 24 & 25 Vict. c. 97, s. 35, and 24 & 25 Vict. c. 100 s. 32, charging the prisoner with the felony of obstructing a railway, with intent to endanger the safety of passengers, &c., was no bar to a subsequent indictment under sections 36 and 34 of the same statutes respectively, preferred on the same facts charging him with the misdemeanour of endangering the safety of passengers, &c., by an unlawful act.

Amendment of Indictment.

R. *v.* WELTON. [93]

[9 Cox, C. C. 297 (1862).]

The indictment charged the prisoner with attempting to murder a child named "Annie Welton," The prosecution, however, failed to prove that the child had ever borne such a name. It was held that the indictment could be amended under 14 & 15 Vict. c. 100, s. 1, by striking out the words "Annie Welton," and substituting "a certain female child whose name is to the jurors unknown." [1]

* "The Act which gives power of amendment," said [* 121] Byles, J., "states in the preamble that 'offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case.' Here the amendment cannot prejudice the prisoner in her defence, and I consider the variance not 'material to the merits of the case.' *A statute of this kind should have a wide construction,* and I shall not interpret it in favour of technical strictness."

[Sleigh for prisoner; Ribton and Oppenheim for Crown.]

Not county, but borough justices. Not 19*s.* 6*d., but* £1. *Not barn, but stack.*—So, in R. *v* Western (*a*), where in an indictment for perjury at petty sessions

(*z*) 15 Cox, C. C. 85.
(*a*) L. R. 1 C. C. R. 122.
[1] A name which the defendant has usually gone by and acknowledged is sufficient: and if there be a doubt which of two names is the real one, the second may be added after an *alias dicta:* 1 Chitty Crim. Law, 203 and note m. Manderson *v.* State, 17 Ala. 179; State *v.* Martin, 10 Miss. 391; Comm. *v.* Bowers, 3 Brews. 350; Arch. Crim. Plead. 241 note (1).

the magistrates were described as *county* magistrates, when really they were for a *borough*, it was held that this was a proper subject for amendment. So, also, as in R. *v.* Gumble (*b*), where the statement in the indictment is, that the prisoner stole nineteen shillings and sixpence, whereas the proof is that she stole a sovereign, or, as in R. *v.* Neville (*c*), where the indictment charges perjury committed on a trial for burning a *barn*, whereas the proof is that the trial was for burning a *stack*, an amendment may be made.[1]

Altering quality of offence. *R.* v. *Wright.*—But an amendment which alters the nature or quality of the offence charged will not be made; and so in R. *v.* Wright (*d*), where the defendant was indicted for a forgery charged as a statutable *felony*, whereas the offence turned out to be forgery at common law, and, therefore, only a *misdemeanor*, it was held that the word "feloniously" could not be struck out of the indictment. "Show me an authority," said the Judge (Hill, J.) to Mr. Campbell Foster, the counsel for the prosecution, "where the Court has made an amendment altering the quality of the offence found by the grand jury from a felony to a misdemeanor;" and Mr. Campbell Foster had to admit that he was not aware of any such case.[2]

"*Intent to defraud.*"—It seems that an indictment for false pretences is bad and incapable of amendment if it omits to allege in express words an "intend to defraud" (*e*).

[*122] * *Defect in Indictment cured by Verdict.*

[94.] **R. *v.* GOLDSMITH.**

[L. R. 2 C. C. R. 74 (1873).]

The prisoner was indicted under 24 & 25 Vict. c. 96, s. 95, for unlawfully receiving goods knowing them to have been obtained by false pretences. The indictment did not set out the false pretences.[3] At the close of the case for the prosecution the objection was taken, on behalf of the prisoner, that the indictment was

(*b*) L. R. 2 C. C. R. 1.
(*c*) 6 Cox, C. C. 69.
(*d*) 2 F. & F. 320.
(*e*) R. *v.* James, 12 Cox, C. C. 127, per Lush, J.

[1] Stewart *v.* Comm., 4 S. & R. 194; Comm. *v.* Maxwell, 2 Pick. 143.

[2] Where an offence is described in an indictment as a crime or a misdemeanour of a particular grade, the indictment need not state the legal conclusion that such act amounts to such crime or misdemeanour: State *v.* Absence, 4 Porter, 397.

[3] An indictment for false pretences must charge the falsity of the pretence by special averment: Amos *v.* State, 10 Humph. 117.

The indictment need not set forth all the property which the defendant obtained by false pretences: People *v.* Parish, 44 Denio, 153; Comm. *v.* Harley, 7 Metc. 462.

bad because it did not set out the false pretences. The prisoner having been convicted, it was held that the objection must be taken to have been made after verdict in arrest of judgment, and that after verdict the indictment was good.

"The objection here raised," said Bramwell, B., "is that the indictment shows no offence. In strictness the objection was taken at the wrong time. A question as to an indictment may be raised by a demurrer, by motion to quash, or by motion in arrest of judgment. Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good. But upon principal, the defect, if any, is cured by verdict." [2]

"This," said Cleasby, B., "is at most the case of a defective averment, and it must be taken after verdict to have been proved in the only sense in which it ought to have been averred."

[Giffard, Q.C., and Poland for prisoner; Metcalfe, Q.C., and Straight for Crown.]

General rule.—It is a general rule of pleading at common law,—and where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases, that where an averment, which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving * that averment [* 123] is found, if it appears to the Court, after verdict, that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment which might have been bad on demurrer, is cured by the verdict (*f*).

R. v. *Stroulger.*—The leading case was followed in the recent case of R. *v.* Stroulger (*g*), where the prisoner was indicted for that at an election for members of Parliament (the Ipswich election of November, 1885), he was "guilty of corrupt practices against the form of the statutes in that case made and provided." The jury found the prisoner guilty of corrupt practices by offering money for votes, and after verdict it was objected that the indictment was bad because it did not sufficiently describe the nature of the offence charged. Upon a motion in arrest of judgment, it was held that, if the objection had been taken before the verdict, it would have been fatal, but that the defect in the indictment was such as could be supplemented by the verdict or the evidence; and, that the prisoner having been found upon the evidence to have been guilty of bribery, the indictment was cured by such verdict. "I think," said Field, J., "that the principle of R. *v.* Goldsmith, which has been cited on behalf of the prosecution, is applicable

(*f*) Heymann *v.* R., L. R. 8 Q. B. 102; and see R. *v.* Aspinall, 2 Q. B. D. 58.

(*g*) 16 Cox, C. C. 85.

[2] Heard on Crim. Plead. 314.

to this case." "There are many cases," said Lord Coleridge, C. J., "in which, if objection were taken to the indictment at the proper time, it would have been fatal, but where, if conviction follows before objection is taken, the defect in the indictment is cured by verdict;" and the learned Chief Justice proceeded to refer with approval to the statement of Wms. Saunders, Vol. I. p. 227, in a note to the case of Stennel *v.* Hogg.

Setting out Material Passages in Indictment.

[95.] **R. *v.* BRADLAUGH AND BESANT.**

[14 Cox, C. C. 68 (1878).]

The defendants were indicted for that they "did print, publish, sell, and utter a certain indecent, lewd, filthy, [* 124] * bawdy, and obscene book called 'Fruits of Philosophy,'" and were found guilty by a jury. It was held, however, that as the indictment did not set out the passage or passages of the book alleged to constitute the offence, but only referred to the book by its title, it was bad, and that the defect was not cured by verdict.[1]

"Our Courts," said Cotton, L. J., "do not allow libels to be perpetrated and disseminated under a pretence of judicial necessity, but that is as far as they go. Where it is revelant and necessary, there is no rule which allows matter to be omitted merely because it is impure or libellous. *A court ought not to consider its records defiled by any matter which a defendant has a substantial interest in demanding to be placed on them.* If it is desirable that there should be an exception in any such case, the Legislature must make it, as it has made exceptions in other

[1] An indictment must charge explicitly all that is essential to constitute the offence. It cannot be aided by intendments, but must positively and explicitly set forth the offence: State *v.* Gray, 3 Stewart, 123; Comm. *v.* Waters, 7 Dana, 29; This is especially the case in criminal prosecutions of the grade of felony: Kit *v.* State, 11 Humph. 167; State *v.* Henderson, 1 Rich. 179; Comm. *v.* Clark, 6 Gratt, 675; Lambert *v.* People, 9 Cowen, 578.

An indictment ought to be as certain as a declaration: State *v.* McCormick, 2 Carter's Rep. 305; Sherbon *v.* Comm., 8 Watts, 212. The four exceptions to particularity in an indictment are first, where one is a common barretor; second, where one is a common scold; third, where one keeps a gambling house or a bawdy house as to the evidence to prove it to be a house of that description; fourth, for soliciting or inciting to the commission of a crime or aiding or assisting in its commission: See the leading case of R. *v.* Rowell.

cases. Is this omission, then, cured by verdict? The rule is simple; verdict will cure only *defective statements.* This is not a mere defective statement; there is an absolute and *total omission.* Such an omission has not been cured, and cannot be cured, by verdict; therefore, according to settled and well-established rules of law, the defendants are entitled to our judgment."

[Sir H. S. Giffard, S.-G. and Mead for Crown.]

Sacheverell's case.—Ten judges in Dr. Sacheverell's case (*h*) delivered an unanimous opinion that, "by the law of England and constant practice, in all prosecutions by indictment or information for crimes or misdemeanours by writing or speaking, *the particular words supposed to be criminal* ought to be expressly specified in the indictment or information."

Imputation of insolvency.—In Cook *v.* Cox (*i*) it was held that, in a declaration for slandering the plaintiff in his trade, a count alleging that the defendant in a certain conversation falsely asserted the plaintiff's insolvency, and stating special damage, but *without setting out the words*, was bad, and that if it were joined with other counts which did set * out the [*125] words, and a general verdict were given the Court would arrest the judgment.

Keeping bawdy prints.—In Dugdale's case (*k*) (where the defendant was charged with preserving and keeping in his possession a number of obscene prints for the purpose of corrupting the morals of the lieges), which was cited by the prosecution in the leading case, it was not necessary that the indecent prints should be set out in the indictment, because the offence was complete, even though the defendant might never have looked at them.

The Counts of an Indictment.

R. *v.* CASTRO. [96.]

[5 Q. B. D. 490 (1880).]

The prisoner was the notorious "claimant" to the Tichborne title and estates, and had been convicted upon an indictment for perjury containing two counts. In one count the offence was alleged to have been committed in an action of ejectment in the Court of Common Pleas, and in the other in an affidavit sworn before the Court of Chancery; but the proceedings in both

(*h*) 5 State Trials, 828.
(*i*) 3 M. & S. 110.
(*k*) 1 Dears. & P. 64.

counts had one object.[1] It was held that two consecutive terms of seven years' penal servitude might be lawfully passed, notwithstanding that seven years' penal servitude is the maximum punishment for perjury.

"It was contended," said James, L. J., "that there was *one fraud and one imposture* by which the plaintiff in error endeavoured to pass himself off as some other person with the view of obtaining certain lands, and therefore *that any number of false statements made on any number of occasions in any number of suits constituted only one perjury*, and that one perjury alone could form the subject of a legal sentence. To my [*126] mind it is only * necessary to state the proposition in order to dispose of it. It is simply monstrous to suppose that the law allows a man to be punished only once for any number of perjuries which he may commit, merely because they are committed in furtherance of one fraudulent scheme and design. . . . It is perfectly idle to suggest that these two sets of false statements constituted but one and the same perjury, or that there is no legal power to pass more than one sentence for those distinct perjuries."

"I will suppose a case like the present," said Bramwell, L. J., "where the perjuries, although committed upon different occasions, relate to the same subject-matter, and I will suppose that each of the offences is deserving of seven years' penal servitude. Is the Crown to prosecute for one offence, and after the defendant has been convicted to wait for seven years before it prosecutes for the other? This, however, is the preposterous result of the argument for the plaintiff in error. Or is the Crown to prosecute upon two separate indictments? And, if it does, what is to happen then? Is judgment to be respited upon the second indictment until the first period of imprisonment is over? Surely the Crown ought to do what is reasonable and consistent—what it has done in the present case—namely, when two offences of the same character are alleged to have been committed, to join

[1] In cases of felony, no more than one distinct offence or criminal transaction at one time should be regularly charged upon the prisoner in one indictment, lest it should confound the defence. But this is a matter which rests with the court: People *v.* Rynders, 12 Wend. 425; U. S. *v.* Dickinson, 2 McLean, 325; *contra*, Wright *v.* State, 4 Humph. 194. However, offences of the same character differing in degree may be united in the same indictment: Arch. Crim. Plead. (8th Ed.) 296; People *v.* Lusoomb, 60 N. Y. 559.

them in separate counts of the same indictment, and it cannot be said that the defendant, if convicted, ought to receive the punishment for one offence only."

[Benjamin, Q.-C., Atherley Jones, Hedderwick, and Spratt for prisoner; Sir H. James, A.-G., Sir F. Herschell, S.-G., Poland, and A. L. Smith for Crown.]

Joining separate felonies. Joining separate misdemeanours. R. v. Murphy.—Indictments for misdemeanours may contain several counts for different offences; and although, where two separate *felonies* are charged in separate counts of the same indictment, it is almost a matter of course for the judge, upon application, to compel the * prosecutor to elect [*127] upon which charge he will proceed (*l*),[2] it is by no means a matter of course for him to do so where two separate *misdemeanours* are similarly charged. Where, howevever, two defendants were indicted for a conspiracy, and also for a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but no evidence against one as to the libel, Coleridge, J., put the prosecutor to his election on which charge he would proceed, before the counsel for the defendants entered upon their defence (*m*).

Joining felonies and misdemeanours.—It seems that the joinder of a count for *felony* with a count for *misdemeanour*, would be held bad on demurrer, or, after a general verdict, on motion in arrest of judgment;[3] for the challenges and incidents of trial are not the same in felony and misdemeanour, and, therefore, they could not be tried together. But where an indictment contains a count for felony, and also a count for misdemeanour, and the prisoner is convicted of the felony alone, such joinder of counts for felony and misdemeanour furnishes no ground for arresting the judgment (*n*).

John Wilkes.—In the leading case the Lords Justices followed R. *v.* Wilkes (*o*), where the judges, in answer to a general question by the House of Lords, whether a sentence of imprisonment to commence from and after

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(*l*) See R. *v.* Ward, 10 Cox, C. C. 42, where the indictment charged the prisoner in three several counts with three several felonies, in sending three separate threatening letters, and Byles, J., compelled the prosecutor to elect upon which count he would proceed. In point of strict *law*, however, it is no objection to an indictment that it charges several different felonies in different counts. See also 24 & 25 Vict. c. 96, ss. 71 and 92, as to embezzlements and larcenies.

(*m*) R. *v.* Murphy, 8 C. & P. 297.

(*n*) R. *v.* Ferguson, Dears. & P. 427, where Lord Campbell, C. J., inveighed against a recorder for reserving such a point.

(*o*) 4 Bun. 2527.

[2] When two or more felonies are charged in the same indictment it may be quashed or the prosecution may be compelled to elect on which one the trial shall be founded: Fisher *v.* State, 33 Tex. 792; State *v.* Brandon, 7 Kans. 106.

[3] An indictment charging both a felony and a misdemeanour is bad on demurrer or on motion for arrest of judgment: U. S. *v.* Sharp, 1 Peters C. C. 118; State *v.* Coleman, 5 Porter, 32; *contra* Buck *v.* State, 2 Harr. & Johns. (Md.) 426.

the termination of an imprisonment to which the defendant (the famous hero of the "North Briton," and the "Essay on Woman") had been before sentenced for another offence, was good in law, replied that it *was* good.

Thomas Robinson.—So, also, where an indictment contained two counts for passing bad shillings to two different people on the same day, and the prisoner was sentenced to two years' imprisonment, this sentence was held to be wrong; but the judges said that a sentence of one year's imprisonment might have been passed for each offence, and that the commencement of the second might be postponed until the termination of the first (*p*). See, also, 7 & 8 Geo. 4 c. 28, s. 10.

[* 128] **Effect of Endurance of Punishment.*

[97.] **LEYMAN** *v.* **LATIMER.**

[3 Ex. D. 352 (1878).]

This was an action for libel brought by the editor of the *Dartmouth Advertiser* against the proprietors, printers, and publishers of the *Western Daily Mercury*, his complaint being that they had described him as "a felon editor." As a matter of fact, the plaintiff had been convicted of felony some years before, and had been sentenced to twelve months' hard labour. But, notwithstanding such conviction and sentence, it was held that, as he had served his time, he was not "a felon editor," and no one had a right to call him such names.[1]

"I am prepared to hold," said Brett, L. J., "that *inasmuch as he has endured his punishment he is not now in law a 'felon;'* endurance of the punishment does away with the penalty: I say so on the authority of Cuddington *v.* Wilkins (*q*), which was a correct, and, in my opinion, a righteous decision. The judges thought that they ought not to favour idle and injurious words; and I may add, that to allow defamatory words to pass unchecked is against public policy. . . . It is no doubt right,

(*p*) R. *v.* Robinson, 1 Mood. C. C. 413; and see R. *v.* Gregory, 15 Q. B. 974.
(*q*) Hob. 67, 81.

[1] Baum *v.* Chase, 5 Hill, 196 (1843), and cases cited. In this instance the plaintiff was accused of a larceny for which he had been pardoned.

To publish what is true of a person is not a criminal offence, if done from good motives and justifiable ends: De Bouillon *v.* People, 2 Hill, 248; *contra* Comm. *v.* Blanding, 26 Mass. 304; but this is not true, if unnecessary: Comm. *v.* Featherstone, 5 Clark (Pa.), 594; Comm. *v.* Odell, 3 Pitts. Rep. 449; Comm. *v.* Snelling, 15 Pick. 337.

upon public grounds, to uphold this doctrine, and to my mind, by enacting 9 Geo. 4, c. 32, s. 3, the legislature deliberately adopted the view of the judges: it was considered to be proper that a person who had endured the punishment for a felony should not be liable to have reflections made upon him."

[Cole, Q. C., and Bullen for defendants; Collins, Q. C., and Pitt-Lewis for plaintiff.]

* The third section of 9 Geo. 4, c. 32 ("An act for amending the [*129] law of evidence in certain cases") is as follows:—

Act of Geo. IV.—"And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, be it therefore enacted that where any offender hath been, or shall be, convicted of any felony not punishable with death, and hath endured, or shall endure, the punishment to which such offender hath been, or shall be, adjudged for the same, the punishment so endured hath, and shall have, *the like effects and consequences as a pardon under the great seal* as to the felony whereof the offender was so convicted: provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

Wives Prosecuting Husbands.

R. *v.* LORD MAYOR OF LONDON. [98.]

[16 Cox, C. C. 81 (1886).]

This was a rule calling upon the Lord Mayor of London and Alfred Vance (the notorious comic singer) to show cause why the Lord Mayor should not be made to grant a summons to Emma Vance against her husband, Alfred, for libel. Alfred had put an advertisement in the *Daily Telegraph* suggesting that Emma was not his wife, but his mistress. It was held, however, that the Married Women's Property Acts do not enable a married woman to take criminal proceedings against her husband for libel. The counsel who argued in support of the rule, contended that the separate property of the wife was affected by the libel, but the Court replied, "How can a prosecution for a libel, which is criminal only because of the tendency above pointed out (viz.,

the "tendency to arouse angry passions, provoke revenge, and thus endanger the public peace"), be said to [* 130] * be for the protection and security of the separate estate? It seems to us impossible to so hold, even if it may hereafter be held (upon which we give no opinion) that an action for libel in a case like the present can be maintained by a wife against a husband. It seems to us, moreover, looking at the complaint made, that it would be impossible to hold the separate estate, as contemplated by the statute, was ever here in jeopardy. *What was damaged, if anything, was the fair fame of the applicant, and that, in our judgment, is not separate estate.* We are of opinion, that neither as the law stood prior to 1870, nor since, can a wife criminally prosecute a husband, or give evidence against him upon a prosecution for a personal libel upon herself."

[Crispe for rule; Poland and W. Baugh Allen for Lord Mayor.]

Recent legislation. *Lemon* v. *Simmons.*—The tendency of recent legislation has been to establish the independence of the wife, so that she can sometimes prosecute her husband for offences against her property.[1] See, however, 45 & 46 Vict. c. 75, s. 12, and the recent case of Lemon *v.* Simmons (*r*). That was an action for slander, the words complained of being to the effect that the plaintiff robbed his wife of £75 before her removal to a lunatic asylum, and

(*r*) 36 W. R. 351.

[1] Freethy *v.* Freethy, 42 Barb. (N. Y.) 641; Tilbs *v.* Brown, 2 Grant (Pa.) 39.

At the common law, suits could not be maintained between husband and wife, but in equity where the separate existence and property of married woman were recognized, they could sue, but the wife only by her next friend.

In many states statutes expressly authorize married women to sue and be sued: Larison *v.* Larison, 9 Ill. App. 27 (1881); Wilkins *v.* Miller, 9 Ind. 100; Jones *v.* Jones, 19 Iowa, 336 (1865); Greer *v.* Greer, 24 Kans. 101; Hardin *v.* Gerard, 11 Bush. 250; Power *v.* Lester, 23 N. Y. 527; Manning *v.* Manning, 79 N. C. 293. There has been a recent statute in Pennsylvania of June 3d, 1887 (P. L. 332).

Whether a statute authorizing a married woman to sue and be sued alone as if sole, authorizes suits between husband and wife is disputed: Smith *v.* Gorman, 41 Me. 405; Crowther *v.* Crowther, 55 Id. 358; Schultz *v.* Schultz, 89 N. Y. 644; Ryan *v.* Ryan, 61 Tex. 473, 474.

It may not be out of place to state a few propositions as regards the employment by a married woman of an attorney, which is so often misunderstood. In equity and under the statutes, wherever she has interests distinct from her husband, she may obtain legal assistance: Kerchner *v.* Kempton, 47 Md. 588; Travis *v.* Willis, 55 Miss. 557.

She may appoint an attorney to take care of litigation respecting her equitable separate estate: Major *v.* Symmes, 19 Ind. 117; Porter *v.* Haley, 55 Miss. 66; King *v.* Mittaberger, 50 Mo. 182; see Myers *v.* Griffis, 11 Rich. 560; Powers *v.* Totten, 42 N. J. Law, 442; Glover *v.* Moore, 60 Ga. 189; Hollingsworth *v.* Harman, 83 N. C. 153; Cayce *v.* Powell, 20 Tex. 767.

was anxious to get rid of her, in order that he might take the remainder of her money. It was held that, as such words did not impute to the plaintiff that he stole his wife's money *while they were living apart, or when he was about to leave or desert her*, they were not actionable, inasmuch as they did not, even under the Married Women's Property Act, 1882, impute an indictable offence.

Act of 1884.—By the first section of 47 & 48 Vict. 14 (which was passed to supply the omission disclosed in R. *v.* Brittleton (*s*), it is provided that, "in any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence."

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* *New Trials.* [*131]

R. *v.* DUNCAN. [99.]

[7 Q. B. D. 198 (1881.)]

On an indictment, found at quarter session removed into the Queen's Bench Division, and tried at Winchester Assizes, for obstructing a highway, the defendant was acquitted, and it was held that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted.

"The practice of the Courts," said Lord Coleridge, C J., "has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment, no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." [1]

[Charles, Q. C., and Bullen showing cause; Collins, Q. C., and Warry in support of rule.]

(*s*) 12 Q. B. D. 266.

[1] While in all proceedings by indictment and in all offences partaking of a criminal intention, it is a rule of universal application, that where the defendant has been acquitted on the merits, a new trial will not be allowed. But if there are intemperate declarations by a juror as in the celebrated treason case: U. S. *v.* Fries, 3 Dall. 515; or misbehaviour by a juror as in Hopkins' Case, 1 Bay (S. C.), 372, a new trial may directed.

This doctrine is the humane influence of the law, mingling justice with mercy *in favorem vitae et libertatis.*

The rule in criminal cases is reducible to three:

1. That a new trial on the merits will not be granted in any case above a misdemeanour, whether the defendant be acquitted or convicted.

Misdemeanours in Queen's Bench Division. Felonies. Venire de novo.—Where a *misdemeanour* is tried in the Queen's Bench Division, or has been removed into that Court by *certiorari*, and sent to be tried as a *nisi prius* record, a new trial may be moved for after conviction on any ground on which a new trial might be moved for in a civil case, as misreception or rejection of evidence, misdirection, or that the verdict was against the evidence (*t*). No new trial, however, can be granted in a case of *felony* (*u*). But in a felony case, as well as in a misdemeanour case, where there has been a *mistrial*, a *venire de novo* will be awarded, and a fresh trial had; for example where the jury have been improperly chosen (*x*).

[*132] * *Torts and Felonies.*

[100.] WELLS *v.* ABRAHAMS.

[L. R. 7 Q. B. 554 (1872).]

In answer to an action for the recovery of a brooch, the defence was raised that, as it appeared from the evidence that the brooch

(*t*) R. *v.* Fowler, 4 B. & Ald. 273; and R. *v.* Whitehouse, Dears. & P. 1.
(*u*) R. *v.* Bertrand, L. R. 1 P. C. 520, overruling R. *v.* Scaife, 17 Q. B. 238.
(*x*) R. *v.* Yeadon, L. & C. 81; and see R. *v.* Murphy, L. R. 2 P. C. 535; and R. *v.* Martin and Webb, L. R. 1 C. C. R. 378.

2. That for irregularity in all cases, whether misdemeanours or felonies, new trials may be granted when there is a conviction.

3. That in misdemeanours new trials may be granted on the merits, where there is a conviction, but not in cases of acquittal: People *v.* Comstock, 8 Wend. 549, Sutherland, J.; People *v.* McKay, 18 Johns. 212; Comm. *v.* Green, 17 Mass. 516, Parker, C. J.; U. S. *v.* Haskell, 4 Wash. C. C. 402; See Graham on New Trials, 503.

In Pennsylvania, it seems to be the constant and unquestioned practice to exercise the right of granting new trials in criminal cases after conviction of every grade: Whar. Crim. Law, 873; Comm. *v.* Murray, 2 Ash. 41; Comm. *v.* Clue, 3 Rawle, 500.

In U. S. *v.* Gilbert, 2 Sumner's C. C. 19, Mr Justice Story said:

"The Constitution of the United States has exhibited great solicitude for the subject of the trial of crimes. Certain amendments of the Constitution, in the nature of a bill of rights, have been adopted, which fortify and guard the inestimable right of trial by jury. One of them provides, no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb."

This principle is sanctioned and enforced in the Constitutions of most of the States: Comm. *v.* Roby, 12 Pick. 502; People *v.* Goodwin, 18 Johns. 201; People *v.* Allen, 1 Parker, 445; State *v.* McKee, 1 Bailey, 651; State *v.* Norwell, 2 Yerg. 24; Bailey's Case, 1 Va. Cas. 258; State *v.* Dennis, 4 Black. 345; State *v.* Bentham, 7 Conn. 418; State *v.* Brown, 16 Id. 54.

was taken by the defendant under such circumstances as to prove a charge of felony, the plaintiff ought to be nonsuited.[1] It was held, however, that a judge at *nisi prius* is bound to try the issues on the record, and cannot nonsuit under such circumstances.

"No doubt," said Cockburn, C. J., "*it has been long established as the law of England* that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But although *that is the rule*, it becomes a different question when we have to consider how it is to be enforced."

[Torr, Q. C., for defendant; Aspinall, Q. C., for plaintiff.]

Wellock v. *Constantine.*—The leading case practically overrules Wellock *v.* Constantine (*y*), where the plaintiff, a housemaid who tried to get damages out of her master for raping her, consented to a non-suit on the judge saying that he should direct a verdict for the defendant, and leaves the question of procedure (assuming the existence of the rule) rather doubtful.

Ex parte Ball.—In Ex parte Ball (*z*), where a clerk had embezzled moneys of his employer to a large amount it was held that, even if a person injured by a felony is debarred from proving in the bankruptcy of the felon, in respect of the injury, until he has prosecuted the felon, the obligation to prosecute does not extend to his trustee in bankruptcy, even though that bankruptcy occured after a proof in * respect of the injury had [* 133] been tendered by the injured person himself. "The law on this subject," said Bramwell, L. J., "is in a remarkable state.".

Appleby v. *Franklin. Mr. Justice Wills on the subject.*—In Appleby *v.* Franklin (*a*), which was an action for the seduction of the plaintiff's daughter, a paragraph of the statement of claim alleged that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion, and it was objected to as imputing a felony which ought to be prosecuted for before it could form the foundation of a civil action. It was held, however, that, as the plaintiff was not the person upon whom the felonious

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(*y*) 2 H. & C. 146.
(*z*) 10 Ch. D. 667.
(*a*) 17 Q. B. D. 93.

[1] While by the English practice, a plaintiff cannot be non-suited against his will, but may insist upon carrying his case to the jury, with us a different rule prevails.

An inferior court may non-suit where the plaintiff fails to make out a case: Pratt *v.* Hull, 13 Johns. Rep. 334; Foote *v.* Sabin, 17 Id. 154; Stuart *v.* Simpson, 1 Wend. 376; but refusing to non-suit, will be cured by proof, subsequently supplied, whether by plaintiff or defendant: Murray *v.* Judah, 6 Cowen, 484; Lansing *v.* Van Alstyne, 2 Wend. 561; Jackson *v.* Leggett, 7 Id. 377. There can be no non-suit in a criminal case: People *v.* Bennett, 49 N. Y. 137 (1872).

act had been committed, and had no duty to prosecute, the paragraph could not be struck out. "The authorities which have been referred to," said Wills, J., "leave no room for doubt that no action can be maintained for a civil injury resulting to the plaintiff from a felonious act on the part of the defendant until public justice has been vindicated by a prosecution of the criminal. It is equally clear that the objection to the maintenance of the action cannot be raised by plea or by demurrer, or, as it would seem, by way of nonsuit, inasmuch as the cause of action still subsists. But here the action is brought not by the person upon whom the felonious act was committed, and who owes a duty to the public to prosecute the offender, but by one who has sustained consequential damage, but who is not under any obligation to prosecute. Osborn *v.* Gillett (*b*) is a distinct authority to show that the present plaintiff is not debarred from maintaining this action."

View of Mr. Justice Cave.—Mr. Justice Cave suggested, in Roope *v.* D'Avigdor (*c*), that the proper way of staying an action, where the facts disclosed a felony which the plaintiff ought to have prosecuted, was "by some application made summarily to the Court."

On the whole subject-matter of this note, see Shirley's Leading Cases in the Common Law, 3rd ed. p. 341.

(*b*) L. R. 8 Ex. 88.
(*c*) 10 Q B. D. 414.

*APPENDIX. [*135]

Consisting of Notes of Recent Cases in the Criminal Law not referred to in the body of the Work.

R. v. Peters, 16 Cox, 36.

Where an undischarged bankrupt obtains goods of the value of 20*l.* and upwards, without paying for them at the time he obtains them, and without informing the person from whom such goods are obtained that he is an undischarged bankrupt, he is guilty of a misdemeanour under sect. 31 of the Bankruptcy Act, 1883, notwithstanding that the contract may be silent upon the question of credit.

A person may be indicted in England for having, whilst resident therein, obtained credit within the meaning of sect. 31 of the Bankruptcy Act, 1883, from a person resident in Ireland at at the time such credit was obtained.

R. v. Cronmire, 16 Cox, 42.

A stock-broker who ignores the written instructions of his principal to buy certain stock, and appropriates a cheque enclosed in the letter, may be convicted under 24 & 25 Vict. c. 96, s. 75.

R. v. Griffiths and Williams, 16 Cox, 46.

Justices, in preliminary inquiries, have no discretion to prohibit the prisoners' solicitors from cross-examining the witnesses for the prosecution.

R. v. Norton, 16 Cox, 59.

An indictment under the Corrupt Practices Act, 1883, which merely charges the defendant with being guilty of a corrupt practice at an election, but does not specifically allege against him what that corrupt practice was, is bad for generality.

*** R. v. The Inhabitants of Lordsmere,** 16 Cox, 65. [*136]

Where a highway is supported by a wall, and such wall becomes dangerous by reason of non-repair, the inhabitants of the place in which such highway is situate, if liable to repair the highway, can be convicted upon an indictment for non-repair, it being a question for the jury whether the wall forms part of the highway or not.

R. v. Lord Mayor of London, and Stubbs and Irving, 16 Cox, 77.

Where a prosecutor *bonâ fide* prefers before a justice, and within his jurisdiction, a charge or complaint in respect of an offence within the Vexatious Indictments Act, 1859, and the justice dismisses it for want of evidence, such dismissal is equivalent to a refusal to commit, and the prosecutor is entitled to require the justice to take his recognizance to prosecute the charge or complaint by way of indictment.

R. v. Shurmer, 16 Cox, 94.

The depositions of a deceased witness are not admissible in evidence against a prisoner under 30 & 31 Vict. c. 35, s. 6, unless it be proved that, at a reasonable time previously to the taking of such depositions, the prisoner was served with a written notice of the intention to take them.

R. v. Finkelstein and Truscovitch, 16 Cox, 107.

The indictment in this case was for uttering forged bonds which were sent abroad, and questions of jurisdiction arose which were decided against the prisoners.

R. v. The Inhabitants of the County of Southampton, 16 Cox, 117 and 271.

This was an interesting case, involving the liability to repair a bridge crossing the River Itchen, in Hampshire. The defendants were successful, as there was no evidence of acquiescence by the county in the building and dedication of the bridge, and the bridge was not a bridge "broken in a highway," within the meaning of the Statute of Bridges, 22 Hen. 8, c. 5.

Osborne v. Milman, 16 Cox, C. C. 138.

A person who is committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solici-
[* 137] tor * while being unqualified, is not a criminal prisoner or a person convicted of crime within 28 & 29 Vict. c. 126, s. 4, so as to be subjected to the treatment resulting from being placed on the criminal side of the prison. He must be treated as a misdemeanant of the first division within the meaning of 28 & 29 Vict. c. 126, s. 67.

R. v. Gunnell, 16 Cox, 154.

Evidence of the fact of a rumor is no evidence of the knowledge of a particular individual, and is not within any of the exceptions to the rule which excludes the reception of hearsay evidence.

R. v. Juby, 16 Cox, 160.

The offence of obtaining credit to the extent of 20*l.* or upwards, by an undischarged bankrupt, is committed where the bankrupt receives and keeps goods of the value of 20*l.* or upwards without paying for them, or informing the creditor of the fact of his being an undischarged bankrupt, or repudiating the contract, although

the goods were sent in execution of an order for goods of a less value than 20*l*.

R. v. Burns and others, 16 Cox, 195.

Where several prisoners are indicted jointly, some of whom call witnesses, and others do not, the Crown has a right of reply on the counsel for those prisoners who call witnesses; but the counsel for the prisoners who call no witnesses has the right to address the jury last.

R. v. Regan, 16 Cox, 203.

Where, in a criminal case, it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, it is absolutely necessary that the original message handed in at the post office should be produced, or proof given that it is destroyed, and the copy received by a witness cannot be given in evidence till it is proved that the original cannot be produced.

R. v. Pierce, 16 Cox, 213.

In an indictment for incurring a debt or liability whereby credit was obtained under false pretences, or by means of fraud, under sect. 13, sub-s. 1, of the Debtors Act, 1869, it is un-
*necessary to specify the false pretences or fraud under [*138]
or by means of which the credit was obtained; sec. 19,
of the act rendering it sufficient to state the substance of the offence in the words of the act, or as near thereto as circumstances admit.

R. v. Stubbs, 16 Cox, 219.

Where a criminal prosecution has been instituted, undertaken or carried on by the public prosecutor, he stands, by virtue of 42 & 43 Vict. c. 22, s. 7, in the same position with regard to costs as a private prosecutor.

R. v. Johnston, 16 Cox, 221.

The defendant was charged under the 147th section of the Merchant Shipping Act, 1854, with supplying a seaman to a merchant ship in the United Kingdom, he not being a person holding a licence from the Board of Trade for that purpose, and it was held that, proof having been given of the supply of the seaman by the defendant, the onus of proving that he held a licence from the Board of Trade rested with him.

Re Dillet, 16 Cox, 241.

In this case (before the judicial Committee of the Privy Council, on appeal from the Supreme Court of British Honduras) a conviction for perjury was quashed on the ground that the charge of the judge to the jury was "grievously unjust to the defendant and in many instances outraged the proprieties of judicial procedure."

Dillon v. O'Brien and Davis, 16 Cox, 245.

When a person is arrested for committing a felony or misdemeanour, any property in his possession believed to have been used by him for the purpose of committing the offence may be seized and detained as evidence in support of the charge; and, if necessary, such property may be taken from him by force, provided no unnecessary violence is used.

R. v. Garvey, 16 Cox, 252.

In order to sustain a conviction for personation, it is not necessary to state in the indictment, or to prove at the trial, that the presiding officer at the booth where the offence was committed was duly appointed.

[*139] ***R. v. Woodfield** 16 Cox, 314.

Where a person is indicted under 9 Geo. 4, c. 69, s. 1, for night poaching after two previous convictions, the previous convictions should not be proved until the jury find a verdict on the facts of the case immediately before the court.

R. v. Webster, 15 Cox. 775.

Under sect. 6 of the Criminal Law Amendment Act, 1885, a mother can be convicted of knowingly suffering her daughter, of the age mentioned in the section, to be in or upon premises for the purpose therein specified, notwithstanding the fact that such premises are those in which the mother and daughter live together, having no other home.

R. v. Cox and Railton, 15 Cox, 611.

A communication between a solicitor and his client, which was a step preparatory to the commission of a criminal offence, is admissible as evidence in the prosecution of the client for such offence.

R. v. Butt, 15 Cox, 564.

A man may be convicted under sect. 1 of the Falsification of Accounts Act, 1875, although he did not personally make the false entry, if it be shown that he authorised or concurred in its being made.

R. v. Mallory, 15 Cox, 456.

The prisoner was indicted for receiving stolen goods. To prove his guilty knowledge, evidence was given that, being asked by the police as to the prices he had given, he said he did not know then, but his wife would make out a list of them, and next day she, in his presence, produced a list, which was received in evidence against him. It was held that it was admissible.

R. v. Labouchere, 15 Cox, 415.

Where an application for a criminal information for a libel upon a deceased person was made by his representative, the court refused in its discretion to grant it.

R. v. Holmes, 15 Cox, 343.

A false pretence was made by letter at Nottingham, and posted in that town to, and received by, a person in France. * In consequence of the letter that person drew a cheque [* 140] in France, payable at Nottingham, and sent it to the prisoner at Nottingham, who cashed it there. It was held (R. *v.* Burdett, 4 B. & Ald., and R. *v.* Cooke, 1 F. & F., being followed) that the prisoner was properly tried at Nottingham.

R. v. Deasy and others, 15 Cox, 334.

The prisoners were charged under the Treason Felony Act, 1848, with being in possession of explosives, &c., and it was held that evidence might be given of the existence of a treasonable conspiracy without showing that the prisoners were connected with it.

R. v. Shimmin, 15 Cox, 122.

A prisoner on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statement, subject to this, that what he says will be treated as additional facts laid before the court, and entitling the prosecution to a reply.

Per Cave, J.: This is the rule of practice now approved of by the judges of the High Court (*a*).

(*a*) See also R. *v.* Reigleluth, Cent. Crim. Ct. Sess. Papers, vol. 103, p. 460, and R. *v.* Doherty, 16 Cox, 306. The later practice appears to be for the prisoner to address the jury *before*, and *not after*, his counsel does so. In the recent case, however, of R. *v.* Borrowes, tried at the Middlesex Sessions on March 10th, 1888, and reported in the *Times* of March 12th, the Assistant Judge denied altogether that a prisoner defended by counsel has any right (apart from the discretion of the presiding judge) to address the jury, and declined to accede to the application of the prisoner's counsel (Mr. Lockwood, Q. C.) to that effect. Whatever may be the correct practice, it is obviously a reproach to the administration of justice in a civilized country that there should be any *uncertainty* about so simple a matter.

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